



ORDINANCE NO: 1203

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CIBOLO, TEXAS AUTHORIZING AND APPROVING AMENDMENTS TO THE VALID AND EXISTING DEVELOPMENT AGREEMENT BETWEEN THE CITY AND CIBOLO TURNPIKE L.P.; SPECIFYING THE FORM BY WHICH SUCH AMENDMENTS TO THE EXISTING AGREEMENT WILL BE MADE; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, representatives of the Texas Department of Transportation (*TxDOT*), the City of Cibolo, Texas (the *City*), and Cibolo Turnpike L.P. (*Turnpike*, and together with the City, the *Parties*) previously engaged in meaningful discussions, consistent with the City's Thoroughfare Plan and Land Use Plan, to determine a method of easing traffic concerns in and around the City; and

WHEREAS, the Parties and TxDOT identified a toll road highway and additions to already planned improvements to FM 1103 as transportation improvements that would create significant economic impact and benefits to the City and the surrounding area; and

WHEREAS, the City formed a Blue-Ribbon Committee (the *Committee*) to further study, provide feedback, and ultimately make recommendations as to this transportation concept; and

WHEREAS, the Committee fully endorsed this project and recommended that the City further proceed in analyzing this undertaking, whereby the City, with Turnpike's assistance, performed a preliminary feasibility study to determine the viability of the identified project, considering projected traffic flow, revenue generation, and estimated construction costs of such a project; and

WHEREAS, the City held a series of public hearings to gather public input regarding the prospective project, and afterward, the City Council of the City (the City Council) reviewed and accepted the feasibility study and voted to move forward with the process, which included City staff involvement in drafting and negotiating preliminary agreements to guide the Parties' prospective actions; and

WHEREAS, on February 28, 2017, the City Council ordered that the City enter into a Development Agreement (the *Existing Agreement*) with Turnpike, which specified and set forth the terms for the prospective design, construction, operation, and maintenance of a segment of FM 1103 within the City, add certain "express lane" flyovers thereto, and construct an additional

limited-access high speed tolled highway from Weil Road and FM 1103 to IH 10 (the Project); and

WHEREAS, the Existing Agreement, a copy of which is attached hereto as Exhibit A, represents a valid and existing contractual agreement between the Parties; and

WHEREAS, based on feedback from parties having an interest in the Project, the Parties have agreed to amend certain terms and provisions of the Existing Agreement (the *Amendment*), for the purposes of further describing and refining certain aspects of the Existing Agreement to ensure accuracy of Project information contained therein, clarifying cost allocation responsibilities (which clarifications are advantageous to the City) relating to and resultant from Project development, editing minor typographical and formatting errors, and eliminating reference to provisions that would otherwise indicate location of any Project component within the City of Schertz, Texas; and

WHEREAS, the amendments to the Existing Agreement to be effectuated by the Amendment are identified in the comparison document attached hereto as Exhibit B, which amendments (and only which amendments) represent the subject of this Ordinance; and

WHEREAS, the amendments to the Existing Agreement identified in Exhibit B hereto shall be memorialized in the Amendment, the form of which is attached hereto as Exhibit C, for the purpose of future administrative ease in reference to a singular document and not in substitution of the Existing Agreement (whose unamended terms remain valid and in effect as of their date of inception); and

WHEREAS, the City Council hereby finds and determines that the adoption of this Ordinance is in the best interests of the residents of the City; now, therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CIBOLO, TEXAS THAT:

SECTION 1. The recitals contained in the preamble hereof are hereby found to be true, and such recitals are hereby made a part of this Ordinance for all purposes and are adopted as a part of the judgment and findings of the City Council.

SECTION 2. The City Council hereby approves the amendments to the Existing Agreement identified in Exhibit B hereto. To memorialize such amendments to the Existing Agreement, the City Council hereby authorizes the Mayor to execute the Amendment, in the form attached hereto as Exhibit C, as evidence of the act and deed of the City Council for any and all purposes.

SECTION 3. This Ordinance shall be construed and enforced in accordance with the laws of the State of Texas and the United States of America.

SECTION 4. If any provision of this Ordinance or the application thereof to any person or circumstance shall be held to be invalid, the remainder of this Ordinance and the application of such provision to other persons and circumstances shall nevertheless be valid, and the City

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Council hereby declares that this Ordinance would have been enacted without such invalid provision.

SECTION 5. This Ordinance shall not be deemed to supersede or replace any prior City Council action relating to matters that may be determined to include the subject of this Ordinance, including prior approval of the Existing Agreement. If for any reason the Amendment is found to be invalid or unenforceable, the Existing Agreement, in its form as it existed prior to the date hereof, shall represent the agreement of the Parties relative to the Project (as it is therein further described and defined).

SECTION 6. It is officially found, determined, and declared that the meeting at which this Ordinance is adopted was open to the public and public notice of the time, place, and subject matter of the public business to be considered at such meeting, including this Ordinance, was given, all as required by Chapter 551, Texas Government Code, as amended.

SECTION 7. This Ordinance shall be in force and effect from and after the date of its adoption, and it is so ordained.

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PASSED AND APPROVED, this the 9th day of May, 2017.

CITY OF CIBOLO, T

Mayor

ATTEST:

City Secretary

(CITY SEAL)



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DEVELOPMENT AGREEMENT between

the City of Cibolo, Texas

and

Cibolo Turnpike L.P.

DEVELOPMENT AGREEMENT

This Development Agreement (the "Agreement") is made and entered into as of <u>March 10,2017</u> (the "Effective Date"), by and between the City of Cibolo, Texas ("City"), and Cibolo Turnpike L.P., a Texas limited partnership ("Cibolo Turnpike")

Representatives of the City, the Texas Department of Transportation ("TxDOT"), and Cibolo Turnpike, by and among themselves, have engaged in meaningful discussions identifying both a transportation improvement and a significant economic development project that, consistent with the scope of the City's Thoroughfare Plan and Land Use Plan, would benefit the City and the area around the proposed Project (as detailed below). The parties to the Agreement believe that the Project offers a number of diverse, ongoing opportunities to maximize the economic benefits and opportunities for public and private entities within the City derived from a limited-access high speed tolled highway. These benefits realized throughout the City include: (1) an alternative separated grade crossing over the Union Pacific Railroad and FM 78; (2) a bridged crossing over the frequently prone-to-flooding Cibolo Creek watershed; (3) additional high speed northwest-southeast highway capacity; (4) development opportunities along the proposed Project; (5) development, maintenance and diversification of the economy of the State; (6) fostering the growth of enterprises based in the San Antonio metropolitan area and; (7) development and expansion of transportation and commerce within the State.

PROJECT OVERVIEW

The Project that is the subject of this Agreement is comprised of three interrelated components: (1) the "Cibolo Parkway", which is the design, build, finance, operation and maintenance of a new tollroad facility extending approximately 7 miles from the intersection of Weil Road and FM 1103 southeast to IH 10; (2) the "FM 1103 Improvements", which consists of the improvements to FM 1103 from IH 35 to Rodeo Way (a corridor of approximately 4 miles) to be constructed by TxDOT; and (3) the "Cibolo Expressway", which consists of adding two express lanes in the median of the FM 1103 Improvements. The term "Project" means the (1) design, build and finance of the Cibolo Expressway and the Cibolo Parkway and (2) operation and maintenance of the FM 1103 Improvements, the Cibolo Expressway, and the Cibolo Parkway. Each Project component, as more fully described herein, is shown on the Project map attached hereto and incorporated by reference as Exhibit 1.

Tollroad Feasibility Process

The City formed a Blue-Ribbon Committee comprised of diverse community members to consider the idea / concept of a tollroad within the community and to be part of the City's thoroughfare plan. The Blue-Ribbon Committee fully endorsed the tollroad concept and recommended that the City further advance the tollroad.

The City with Cibolo Turnpike's assistance performed a Feasibility Study to analyze the viability of a possible tollroad facility in the City. The Feasibility Study considered the projected traffic and revenue and estimated project costs. In addition, as part of the study process a series of City Public Hearings were held to gather citizen input about this possible Project. The City reviewed

Initials: CITY 340 CIBOLO TURNPIKE Page 1

and accepted the Feasibility Study, and voted to move forward with the process to develop the Project.

Cibolo Expressway (FM 1103 - Improvements)

TxDOT is currently planning improvements on FM 1103 from IH 35 to Rodeo Way Drive. The proposed TxDOT improvements are to widen the existing two-lane facility to four-lanes, including raised medians and left turn lanes, two 5' bike lanes, curbs and gutters, underground storm sewer system, and 6' sidewalks along both sides of the roadway (collectively referred to as the "FM 1103 Improvements"). The existing FM 1103 right-of-way ("ROW") is 80 feet wide, and the proposed ROW is 120 feet. TxDOT will acquire the additional ROW. The City will request TxDOT that the design for the FM 1103 Improvements accommodate for the addition of future express lanes within the median.

Under TxDOT's "Turnback Program" the City will request that upon TxDOT's completion of the FM 1103 Improvements that TxDOT transfer to it (or an instrumentality thereof) ownership of FM 1103 from IH 35 to Weil Road including the ROW.

Cibolo Tumpike proposes to add two express lanes within the median, a distance of approximately 4 miles the "Cibolo Expressway." The Cibolo Expressway project would begin after the completion of the TxDOT FM 1103 Improvements, and the City's acceptance of FM 1103 from TxDOT. The Cibolo Expressway will be funded solely by Cibolo Tumpike; and, as provided herein, the construction of the Cibolo Expressway shall be coordinated with TxDOT so that the construction of the express lanes shall occur simultaneously with the construction of the proposed TxDOT improvements in order to minimize traffic disruption on FM 1103.

Cibolo Parkway

Cibolo Parkway is the proposed new tollroad facility from the intersection of Weil Road and FM 1103 to the Zuehl Road Exit on I-10 approximately 7 miles long. Cibolo Turnpike, on the City's behalf, will develop Cibolo Parkway that will include the design (with a concrete surface in accordance with TxDOT standards for roads having similar size and scope), environmental studies, right-of-way acquisition, construction, maintenance, and operation.

Project Development Process

Cibolo Turnpike will develop the Project in two phases with Phase I being development of a Pro Forma Model to verify the financial viability of the Project, and Phase II being the detail design, ROW acquisition, and construction of the Project.

RECITALS

A. Essential transportation improvements in and around the City are required to satisfy the accelerated growth being experienced there. Financial assistance from the State is not currently available for all of the City's approved and critical projects; therefore, the City has resourced another alternative to help provide the funding it needs.

Initials: CITY CIBOLO TURNPIKE Page 2

- B. Extensive, prime economic development opportunities exist in an area of the City bound by the FM 78 on the west and IH-10 on the east. These opportunities include commercial and residential growth along both of these major transportation corridors, as well as new improvements to the City's infrastructure that will implement and manage planned growth for this undeveloped area of the City.
- C. The City has determined that it would be in its best interests, in fulfilling its public purpose and legislative mandate, to develop a limited-access high speed tolled highway to satisfy economic and population growth issues as well as to provide an alternate southeast/northwest route separated grade crossing over the Union Pacific Railroad and FM 78, between IH-35 and IH-10.
- D. The City wishes to further define the feasibility of the Project, and thus Cibolo Turnpike will undertake studies, including the Pro Forma Model, to determine whether the Project appears to be feasible (financially and otherwise), and to determine whether surplus revenues under the Operating Agreement (as hereinafter defined) can be expected to support a significant portion, if not all, of the Project's projected construction, operation and maintenance, and finance costs.
- E. As evidence of the City's desire to advance the Project, and in furtherance of the Blue-Ribbon Committee's recommendations the City will do the following: execute this Agreement; petition the Alamo Area Metropolitan Planning Organization (the "AAMPO") for the adoption of the Project and formally place the Project on the funded portion of the AAMPO's Metropolitan Transportation Plan; and request that TxDOT enter into a Memorandum of Understanding with Cibolo Turnpike for the development of the Project.

NOW, THEREFORE, in consideration of the premises, covenants, agreements and obligations contained herein, the parties do hereby agree as follows:

ARTICLE I

SUBJECT OF AGREEMENT

A. Purpose of This Agreement

The purpose of this Agreement is for the development, finance, operation, management, and maintenance of the Project by Cibolo Turnpike. This Agreement defines the development of the Project, and an Operating Agreement defines the Project operating terms all as mutually agreed upon by the Parties.

B. Parties to This Agreement

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The City is a home rule municipality, exercising governmental functions and powers as a home rule city in the State of Texas. The "City," as used in this Agreement includes the City of Cibolo, Texas, and any assignee of, instrumentality of, or successor to its rights, powers, and responsibilities.

CIBOLO TURNPIKE Page 3



Cibolo Turnpike, LP, is a Texas limited partnership and Cibolo Turnpike, CP, LLC, a Texas limited liability company, is its sole general partner created for the development and operation of the Project.

ARTICLE II

TERM AND CANCELLATION

Section 2.1

- (a) This Agreement shall be for a term of fifty (50) years, plus additional time, as needed to conform with the Financial Model, beginning on the Effective Date as defined herein (the "Term"). The Operating Agreement as part of this program will run coterminus with the Development Agreement.
- (b) The City hereby authorizes, permits and grants a non-exclusive right to Cibolo Turnpike, and to all agents, representatives, consultants, employees, and invitees of Cibolo Turnpike, easement, right-of-way, ingress, egress, access, and use rights in, over, upon, across and along all ingress, egress and access portions of all streets adjacent to the Project belonging to the City, to Cibolo Turnpike's for the development and operation of the Project and/or otherwise as provided for in this Agreement. Any temporary road closures and / or temporary detours will be coordinated with the City.

ARTICLE III

GENERAL CONTRACT PROVISIONS

Section 3.1 General Contract Provisions. Notwithstanding anything in this Agreement to the contrary, to the extent applicable, any and every contract Cibolo Turnpike may negotiate or execute under the authority of this Agreement, either on behalf of itself, behalf of the City, or both itself and the City shall be subject to terms and conditions of this Section 3.1, which are as follows:

(a) Cibolo Parkway:

- (i) Land Acquistion.
 - A. Costs: At its sole cost and expense, Cibolo Turnpike shall acquire all necessary ROW for the Cibolo Parkway.
 - B. Land Acquisition Process. Cibolo Turnpike shall negotiate Cibolo Parkway facility land acquisition transactions on a fair-market price basis, as determined by independent appraisals; and, the City's institution of eminent domain shall only be used as a last resort for the acquisition of any new ROW. All land acquisitions shall also be subject to the following:
 - 1. In the event that eminent domain is determined to be necessary, Cibolo Turnpike shall reimburse the City for any and all costs the City incurs in undertaking the eminent domain action.
- (ii) Development of the Cibolo Parkway shall be subject to the following:

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- A. Route. As this is a community driven project, the City shall have the final determination as to the Cibolo Parkway route, so that the route complies with the City's Thoroughfare Plan and Future Land Use Plan and considers projected future development.
- B. Construction Standards. Cibolo Turnpike will develop the Cibolo Parkway using TxDOT standards for roads of similar size and scope to ensure a quality design.
- C. The Cibolo Parkway road surface shall be concrete and the road construction shall comply with the requirements of any City ordinance regulating road and street construction.

(b) Cibolo Expressway:

- (i) Development of Cibolo Expressway. TxDOT is currently planning improvements on FM 1103 from IH 35 to Rodeo Way Drive. The proposed TxDOT improvements are to widen the existing two-lane facility to four-lanes, including raised medians and left turn lanes, two 5' bike lanes, curbs and gutters, underground storm sewer system, and 6' sidewalks along both sides of the roadway. (the "FM 1103 Improvements") The existing FM 1103 right-of-way ("ROW") is 80 feet wide, and the proposed ROW is 120 feet. TxDOT will acquire this additional ROW. The City will request TxDOT that the design for the FM 1103 Improvements accommodate for the addition of future express lanes (being the Cibolo Expressway) within the median; and that TxDOT coordinate the construction of the Cibolo Expressway express lanes with the construction of the proposed TxDOT improvements in order to minimize traffic disruption on FM 1103.
- (ii) Land Acquisition. In the event that additional ROW is needed for the Cibolo Expressway project, beyond the additional ROW that TxDOT acquired as part of the FM 1103 Improvements, Cibolo Turnpike shall acquire the ROW following all City, State, and Federal rules and procedures. Any ROW acquired shall be consistent with the provisions of Section 4.8.
- (c) Financing. The Project shall be financed solely by Cibolo Turnpike from private capital and investment. Further, in no event shall the following ever occur:
 - a. Creation of a public improvement district to fund any aspect of the toll lanes of Cibolo Expressway and Cibolo Parkway; or
 - b. The use of dedicated Local, State or Federal tax dollars to fund any aspect of the toll lanes of Cibolo Expressway and Cibolo Parkway; or
 - c. The use of public grants or direct governmental loans, such as Transportation Infrastructure Finance or Innovation Act loans, to fund any aspect of the toll lanes of Cibolo Expressway and Cibolo Parkway.
- (d) Transfer of Title. Upon completion of the Project, right of title and possession to the real property and the improvements shall be transferred to the City (or an instrumentality thereof), except for those rights of operation transferred to Cibolo Turnpike pursuant to the Operating Agreement, unencumbered by any liens or restrictions against its use as a public right-of-way, (including the right to place public utilities in such rights-of-way).
- (e) Project Operation; The Operating Agreement. The right, duty and obligation to operate the Project upon its completion shall be the responsibility of Cibolo Turnpike. Operational requirements relative to the Project shall minimally include the following:
- (i) That the term of the Operating Agreement shall run co-terminus with this Agreement.

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- (ii) That tolls for vehicles traveling on the tolled portions of the Project shall be subject to the provisions of Section 9.2(iii).
- (iii) That the following vehicles shall not be subject to any toll for travel on the Projects official City of Cibolo vehicles, official City of Schertz vehicles, official Schertz-Cibolo Universal City Independent School District vehicles, and official Guadalupe County Sheriff's Office vehicles, vehicles being used by an entity to provide emergency services to the City of Cibolo under contract; or such other vehicles exempted by state law from the payment of tolls;
- (iv) That Cibolo Turnpike shall advise the City of the initial and future toll rates at least 90 days before implementation;
- (v) That the standards for Project operation shall, minimally, adhere to TxDOT's operational protocol for projects of similar size, scope and traffic count;
- (vi) That the City shall be entitled to provide to Cibolo Turnpike input regarding Project operation, which input shall be taken into consideration and, to the extent commercially and practically reasonable (within the financing structure to which the Project is at such time subject), implemented;
- (vii) That the payment of operations and maintenance costs shall have a first priority position in the event of the operator's default or bankruptcy;
- (viii) That Cibolo Turnpike shall maintain a customer service office within the corporate limits of the City of Cibolo for the purpose of resolving claims of erroneous toll charges and related matters;
- (ix) Requirement that operator to maintain adequate liability insurance; and
- (x) A "buyback" provision, which shall state the terms and conditions by which the City may buy Cibolo Turnpike's interest in the Operating Agreement at a future date.
- (f) Prior to Financial Close, the City and Cibolo Turnpike shall negotiate the terms of a standalone "operating agreement" regarding the Project's operation that, minimally, encompasses a through g of this Section 3.1(e), which operating agreement shall be presented to City Council for consideration; provided, however, that the failure of the City and Cibolo Turnpike to enter into a separate operating agreement shall not invalidate Cibolo Turnpike's right, duty and obligation to operate the Project as specified hereunder; provided further, however, that any operation of the Project by Cibolo Turnpike shall be subject to the minimum operational requirements specified in a through g of this Section 3.1(e). For purposes of this Agreement, the term "Operating Agreement" shall mean any agreement pursuant to which Cibolo Turnpike operates the Project, whether by separate agreement or pursuant to the provisions of this Section 3.1(e) and other applicable provisions of this Agreement.
- (g) Non-Compete Language Prohibited. Cibolo Turnpike shall never require the City to enter into any "non-compete" agreement; and no contract authorized under this Agreement or the Operating Agreement shall ever negate or diminish the City Council's authority to plan, fund and construct future streets, roads, highways, mass transit, or other such improvements as City Council may, in its sole discretion, find necessary to address the transportation needs of the City and its citizens. Further, should such a "non-compete" provision be incorporated in any contract or agreement authorized by this Agreement, it shall be void ab initio.

Initials: CITY A CIBOLO TURNPIKE Page 6

(h) Other Governmental Approvals. The obligations of the Parties shall be subject to the ability to obtain any necessary approvals from other governmental entities that are required for completion and operation of the Project.

ARTICLE IV

PROJECT DEVELOPMENT

Section 4.1 Project Development - Phase I.

- (a) <u>Pro Forma Model</u>. During Phase I of Project Development, Cibolo Turnpike shall cause to be prepared a Pro Forma Model for the Project. Cibolo Turnpike will use the Pro Forma Model to determine the financial viability of the Project. The Pro Forma Model analysis will include the preliminary determination of various risk factors as they relate to development of the Project, such as environmental, design, cost and traffic and revenue issues.
- (b) Term of Phase I. Cibolo Turnpike shall begin Phase I upon the execution of this Agreement, and will diligently work on the Pro Forma Model. Upon the completion of the Pro Forma Model analysis, Cibolo Turnpike will present the results to the City, which shall include Cibolo Turnpike's proposed plan for Project Development Phase II. Phase I is anticipated to take approximately 10-12 months to complete.

Section 4.2 <u>Project Development - Phase II.</u>

- (a) <u>Project Development Phase II is</u> the development of the Project including the detail design, ROW acquisition, bidding, and construction. Including developing the Financial Model (as detailed below in Section 4.2(c)), and securing the funding as required for the development of the Project. Cibolo Turnpike shall comport with the requirements Texas Local Gov. Code Chapter 212, Subchapter C. ("Developer Participation in Contract for Public Improvements") with respect to the development of the Project
- (b) <u>Term of Phase II</u>. Phase II the development of the Project will begin after Cibolo Turnpike completes Phase I Pro Forma and determines that the Project is financially viable. Commencement of Project construction shall not begin until Project funding) has occurred (as detailed below in Section 4.3. Phase II will be complete upon the completion and acceptance of the construction of the Project.
- (c) <u>Financial Model</u>. Financial Model means the computerized financial model including projections and assumptions for operation of the Project showing, among other things: (a) costs for the operation and maintenance of the Project, including management payments to Cibolo Turnpike for its operation of the Project; (b) debt service costs for debt incurred by Cibolo Turnpike related to the Project; (c) reserves for operations and for capital improvements or such other reserves as may be required by sound engineering practice; (d) payments to Cibolo Turnpike as a return on equity invested by its partners, based on the Base Case Equity IRR, as defined and set forth in the Financial Model; and (e) payments to the City

Initials: CITY (A) CIBOLO TURNPIKE (III) Page 7

and Cibolo Turnpike as a split of all remaining revenues from the operation of the Project, based on the percentages as set forth in the Financial Model.

(d) <u>Construction Contract</u>. Cibolo Turnpike shall advertise for construction bids, issue bid proposals, receive and tabulate the bids, and award and administer the contract or contracts for construction of the Project (the "Construction Contract"). Administration of the Construction Contract shall include the responsibility for construction engineering, material acceptance testing, and construction quality acceptance, and for issuance of any change orders, supplemental agreements, amendments, or additional work orders that may become necessary after the award of the Construction Contract. The bidding process is to be competitive and comply with all applicable federal and state laws. Copies of the Construction Contract shall be provided to the City, including any bond or insurance requirement as detailed herein.

(e) <u>Insurance and Bonding Requirements</u>

- (i) <u>Performance Bonds</u>. Cibolo Turnpike will provide Performance Bonds to ensure completion of the Project. In addition, included within any successful bidder's Construction Contract, the successful bidder shall include a Performance Bond to ensure completion of the Project.
- (ii) Insurance Requirement. Cibolo Turnpike will provide the appropriate construction and management insurance package for the development of the Project (the "Insurance Coverage"). In addition, included within any successful bidder's Construction Contract will be the applicable Insurance Coverage consistent with the City coverages and as stated in Section 4.2(d) above.
- (f) <u>Development Standards / TxDOT Coordination.</u> As part of the development of the Project, Cibolo Turnpike will develop the Project using TxDOT standards (for road projects of similar size and scope) to ensure a quality design. In addition, Cibolo Turnpike will continually coordinate with TxDOT with all aspects of the Project including environmental coordination / approvals, and design approvals. Cibolo Turnpike will follow TxDOT's guidelines for 'local let' projects. The Project is planned to have a concrete pavement surface as previously described. Cibolo Turnpike will consult with TxDOT and the City regarding pavement design.
- (g) <u>Construction Management Services</u>. During the construction of the Project, Cibolo Turnpike shall manage the progress of construction through final completion of the Project. Cibolo Turnpike shall monitor the timing of commencement, progress and completion of Project construction by the contractor in accordance with the terms of the design, bid documents, environmental compliance issues, and the Construction Contract, and shall coordinate with the City and TxDOT as necessary or advisable to ensure compliance with any applicable State and federal requirements.
- (h) Project Communication. During the construction of the Project, Cibolo Turnpike shall periodically, and no event less than once every three months, report the Project progress to the City Council. The first report shall provide City Council with an estimated timeline for completing each phase of the Project, the estimated Project costs, and any

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anticipated issues that may delay completion of the Project. Thereafter, Cibolo Turnpike shall update the City Council on construction progress and Project costs incurred during the preceding quarter.

- (i) <u>Project Completion</u>. When the Project is complete, Cibolo Turnpike shall issue and sign a "Notification of Completion" certifying that all work has been completed in accordance with the requirements of this Agreement, all governmental approvals, and applicable laws.
- Section 4.3 <u>Development Funding</u>. Cibolo Turnpike commits to use its commercially reasonable efforts to raise sufficient capital, either debt and/or equity (the "Development Capital") to be used to pay substantially all of the development costs of the Project. Funds for the development of the Project shall be secured prior to the commencement of Project construction (evidence of acquisition of which financing is referred to herein as "Financial Closing").
- Section 4.4 Authority and Responsibility of Cibolo Turnpike During Development Period Regarding the Cibolo Parkway and Cibolo Expressway. The City acknowledges and agrees that, consistent with and subject to the provisions of Article IV, during Phase I and Phase II of the Project's development, Cibolo Turnpike shall be responsible for, and have the authority to take, all actions it deems reasonably necessary to achieve the Financial Closing and thereafter for any further actions reasonably necessary to pursue all or any part of any Phase II (being the Project's development period). As noted above, Cibolo Turnpike will develop the Project following Texas Local Gov. Code Chapter 212, Subchapter C. (Developer Participation in Contract for Public Improvements), which provides for Cibolo Turnpike managing the development of the Project. There may be additional actions that may be subject to the consent of City, which consent shall not be unreasonably withheld, may include, without limitation, the following:
 - (a) Managing the day-to-day business affairs of City relating to the Project.
- (b) Retaining engineers, consultants, attorneys, accountants, financial advisors and other professionals and entering into contracts with Cibolo Turnpike.
- (c) Identifying potential Project sites and negotiating for the acquisition of such Project sites.
 - (d) Commissioning and preparing all Project studies.
- (e) Selecting technology for the Project and negotiating for the acquisition or license of such technology.
- (f) Designing or supervising the design of the Project, including size, configuration, performance levels, operating parameters and related design matters.
- (g) Applying for such governmental approvals as may be required for the Project.
- (h) Preparing such bid documents as may be required for the acquisition of equipment, services and other assets necessary for the Project.
- (i) Negotiating contracts for the procurement of materials and supplies to be utilized by the Project.
- (j) Negotiating the acquisition of (or options to acquire) easements and rights of way as may be required for the Project.

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- (k) Negotiating contracts for Project utilities.
- (1) Negotiating contracts for the sale or other disposition of property determined to be surplus relative to the development of the Project.
- (m) Developing a plan of financing, preparing financing documents, preparing offering documents and doing all related work necessary to achieve Financial Closing.
 - (n) Developing a Market Standard package of insurance for the Project.
- Section 4.5 <u>Responsibility for Development Costs.</u> Cibolo Turnpike shall be responsible for the Project's development costs, including the payment of all costs incurred by Cibolo Turnpike in performing its obligations of the Agreement, (which costs are subject to reimbursement from the Financial Closing).
- Section 4.6 No Liability for the Development Costs. If the Financial Closing does not occur, except as otherwise expressly set forth in the Agreement, neither City nor Cibolo Turnpike shall have any obligation, express or implied, to reimburse the other Party for any Project development cost, but any Party which breaches a material provision of this Agreement, and fails to cure such breach, shall be liable for actual damages suffered by the other Party.

Section 4.7 Level of Effort; Cooperation.

- In developing the Project under this Agreement, Cibolo Turnpike's (a) obligations shall be limited to commercially reasonable efforts. Nothing herein shall imply or create the inference that if Cibolo Turnpike concludes, in its sole discretion, that the Project as envisaged by the Agreement will not be economically feasible or are not capable of being completed on a commercially reasonable basis, that Cibolo Turnpike must nonetheless continue developing the Project and expending additional funds; provided that if Cibolo Turnpike reaches a conclusion that the Project as envisaged by the Agreement will not be economically feasible or are not capable of being completed on a commercially reasonable basis, Cibolo Turnpike will deliver a "Determination of Non-Feasibility" to the City, expressing this conclusion and the reasons therefor. However, if Cibolo Turnpike reaches a conclusion that the Project, as envisaged by the Agreement, will be economically feasible and capable of being completed on a commercially reasonable basis, Cibolo Turnpike will deliver a "Determination of Feasibility" to the City, expressing this conclusion before the date of termination, as stated in Section 4.10. Upon the City's receipt of a "Determination of Feasibility" Cibolo Turnpike shall become contractually obligated to fully complete the Project as envisaged by the Agreement.
- (b) Subject to the other provisions of this Agreement, the Parties hereto shall cooperate fully with each other and their respective officers, directors, employees, agents, counsel, accountants and other designees in connection with any steps required to be taken as a part of the Project.

Section 4.8 Right of Way (ROW).

(a) ROW Coordination. The Parties agree to coordinate with TxDOT and any other governmental authority in an effort to acquire any additional rights of way, including railroad crossing permits/approvals or sites for the Project through the use of existing or acquired road rights of way or other locations.

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- (b) ROW Acquisition Process. Cibolo Turnpike will acquire the necessary ROW for the Project. The ROW acquisition process will follow all applicable State and federal rules regarding the acquisition of ROW. Cibolo Turnpike will keep the City informed throughout the ROW acquisition, including status, issues, and other items that may occur. Cibolo Turnpike goal and as directed by the City, is to acquire the ROW through a negotiated process and terms; however, only if all other means fail will the acquisition go to eminent domain.
- (c) Eminent Domain. Only, after Cibolo Turnpike's good faith attempt (as established, minimally, as the basis upon which TxDOT exercises the power of eminent domain in similar circumstances) to acquire the ROW, then does the City agree to allow the use of its eminent domain authority, exercised only in accordance with the provisions of applicable Texas law, to secure remaining ROW property on behalf of the City.
- (d) ROW Title. Title of the ROW property will ultimately transfer to and be held by the City (or an instrumentality thereof). During the ROW acquisition title of the ROW may be with an another entity to facilitate the process. The identification and use of the entity will be submitted for approval of the City, which approval shall not be unreasonably withheld.

Section 4.9 Ownership of the Studies; Government Approvals.

- (a) In recognition of the fact that Cibolo Turnpike may have paid for the studies, Cibolo Turnpike shall retain ownership of such studies and government approvals issued to Cibolo Turnpike during the Project's development. All other studies and government approvals obtained by or issued to Cibolo Turnpike shall remain as the property of Cibolo Turnpike and in the event of a termination of this Agreement, all studies and government approvals obtained by or issued to Cibolo Turnpike shall remain as the property of Cibolo Turnpike. Nothing in this subsection shall preclude the Parties from agreeing, on mutually acceptable terms, for the transfers the studies and government approvals to the City.
- (b) Provided Cibolo Turnpike proceeds with completion of the Project, should any portion of the Project be terminated or otherwise dropped from the Project by City in accordance with the terms of this Agreement, and Cibolo Turnpike is not in breach of this Agreement or initiated a claim against the City under this Agreement, City agrees to transfer to Cibolo Turnpike, at no cost to Cibolo Turnpike, copies of all governmental approvals, studies and all other rights held by City that are related to such terminated portions of the Project, to the maximum extent permitted by law or by the terms of any such rights or governmental approval.

Section 4.10 Termination.

(a) This Agreement shall terminate upon (i) the delivery by Cibolo Turnpike to City of a Determination of Non-Feasibility; or (ii) notice by City at any time after December 31, 2018 (unless Cibolo Turnpike shall have notified City in writing that it has reasonably determined that additional time is necessary to achieve the Initial Financial Closing, but not to exceed 180 days) if the Financial Closing Date has not yet occurred; or (iii) the City determines that that Cibolo Turnpike failed to coordinate with TxDOT the construction of the TxDOT FM 1103 Improvements and the Cibolo Expressway express lanes, as described in

Initials: CITY

CIBOLO TURNPIKE

Page 11



Section 3.1(b)(i), so that such construction of both shall be accomplished simultaneously and cause minimal traffic interruption on FM 1103.

- (b) If this Agreement is terminated pursuant to <u>Section 4.10(a)</u>, each Party shall be released from its obligations under this Agreement, other than liabilities for any breach of this Agreement.
- Section 4.11 <u>Indemnification</u>. Cibolo Turnpike shall indemnify, defend and hold harmless the City and its respective City Council members, officers, employees, representatives, attorneys and agents (the "City Indemnitees") from any losses or claims that may at any time be imposed upon, asserted against or incurred by any City Indemnitee, to the extent such losses arise out of:
- (a) The inaccuracy in any material respect of any representation or warranty of Cibolo Turnpike contained herein or the failure of Cibolo Turnpike in any material respect to comply with any of its obligations under this Agreement; or
- (b) Cibolo Turnpike's breach of a contract with a third party, or the negligent acts or omissions, or the gross negligence, or the recklessness, or the willful misconduct of Cibolo Turnpike or any of its partners, contractors, agents or affiliates in connection with the Project.
- Section 4.12 <u>Limitation on Liability</u>. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, NEITHER CIBOLO TURNPIKE NOR THE CITY, NOR ANY OF THEIR RESPECTIVE PARTNERS, OFFICERS, EMPLOYEES, MEMBERS, REPRESENTATIVES, ATTORNEYS OR AGENTS SHALL BE LIABLE TO THE OTHER, WHETHER IN CONTRACT, TORT, WARRANTY, NEGLIGENCE, STRICT LIABILITY OR OTHERWISE, FOR ANY LOSS OR PROSPECTIVE PROFITS OR ANY OTHER SPECIAL, PUNITIVE, EXEMPLARY, INDIRECT, INCIDENTAL OR CONSEQUENTIAL LOSSES OR DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR ANY FAILURE OF PERFORMANCE RELATED HERETO, HOWSOEVER CAUSED, WHETHER ARISING FROM SUCH PERSON'S SOLE, JOINT OR CONCURRENT NEGLIGENCE.

ARTICLE V

PROJECT CONTRACTS, APPROVAL RIGHTS AND AUTHORITY

Section 5.1 <u>Cibolo Turnpike's Authority to Negotiate Project Contracts During Development Period.</u> To the maximum extent permitted by law, City authorizes Cibolo Turnpike to identify parties, including without limitation, Cibolo Turnpike, Texas Turnpike Corporation and other affiliates of Cibolo Turnpike, to initiate and negotiate the terms of, all Project contracts that Cibolo Turnpike reasonably determines must be negotiated or executed prior to the Financial Closing and thereafter. Cibolo Turnpike will develop the Project following Texas Local Gov. Code Chapter 212, Subchapter C. (Developer Participation in Contract for Public Improvements), which provides for Cibolo Turnpike managing the development of the

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Project. Cibolo Turnpike's authority under this Section includes the authority to identify parties to, and negotiate the terms of, Project contracts. Such Project contracts may include, without limitation, project design, environmental studies, traffic and revenue studies, construction management agreements, agreements with investment bankers and other agreements related to the Financial Closing. To the extent practicable and consistent with the timely achievement of the Financial Closing, Cibolo Turnpike shall consult with City's Representative (as defined below) regarding the selection of other parties to Project contracts.

- Project Contract Provisions. Unless otherwise agreed to by City or as Section 5.2 otherwise specifically provided in this Agreement, in connection with the negotiation of the terms of Project contracts, Cibolo Turnpike shall use commercially reasonable efforts to include the following provisions in Project contracts:
- The Construction Contract as recommended by Cibolo Turnpike based upon the low bid by pre-approved qualified contractors.
- The party other than City (the "Contractor") shall use labor from the Project's general area to the extent reasonably available.
- The liability of City, if any, pursuant to such Construction Contract shall (c) be limited to the assets of the Project.
- The Contractor shall indemnify City Indemnitees for any losses to property, or liabilities to third parties directly or indirectly resulting from the negligence or willful misconduct of the Contractor in the performance or failure to perform its obligations under such Project contract, provided that such indemnity shall not apply to any such losses or liabilities incurred by City Indemnitees by reason of City Indemnitees' gross negligence or willful misconduct.
- The Contractor shall waive all indirect, incidental, consequential, special, punitive or exemplary damages it might incur.
- No Project contract shall become effective until the Financial Closing, except for obligations to satisfy conditions precedent and Project contracts that, by their nature, require effectiveness before such date (e.g., investment banker engagement letter).
- The Contractor shall provide a performance, payment and completion bond, or shall agree to such other assurances (as, for example, a letter of credit or indemnification) as will provide reasonable assurance of performance, payment and completion.

CIBOLO TURNPIKE

ARTICLE VI

COMPENSATION

Section 6.1 Compensation / Return.

- (a) <u>Cibolo Parkway Facility</u>. If Cibolo Turnpike undertakes the Project, Cibolo Turnpike's base compensation will be as set forth in the Financial Model and City's compensation or return shall be an annual split of all remaining Surplus Revenues of the Project, based on the percentages as set forth in the Financial Model, which includes those surplus funds remaining under the indenture or other documents after providing for: (1) all operation and maintenance expenses, (2) taxes, (3) all debt service on debt incurred to finance or improve the Project, (4) all contractual commitments (5) all required reserves as set forth in the Financial Model, and (6) the necessary payments to Cibolo Turnpike to achieve a return on equity based on the Base Case Equity internal rate of return, all as further identified within the Financial Model or the Operating Agreement (as applicable).
- (b) <u>Cibolo Expressway Facility</u>. If Cibolo Turnpike undertakes the Cibolo Expressway and the Cibolo Expressway is financed as described herein, the parties' compensation or return shall be as identified within the Financial Model or the Operating Agreement (as applicable). In addition:
- (i) reimbursement of "Development Capital", as defined and identified in the Financial Model, for the Cibolo Turnpike and Cibolo Expressway to the extent not paid pursuant to other provisions of this Agreement, shall be paid promptly, following the Financial Closing for any of the Project, from the proceeds of such financing, an amount equal to the Development Capital actually expended or incurred by Cibolo Turnpike to the Cibolo Turnpike and Cibolo Expressway, plus interest at a rate not to exceed 12% per annum; and
- (ii) reimbursement shall be made to the City for staff time devoted to bringing the project to fruition and consultant fees the City incurs directly related to the project, which shall include: an amount equal to \$15,000.00 to compensate the City for staff time, and, reimbursement for legal, engineering and public relations consultant fees actually expended or incured by the City, plus interest at a rate not to exceed 12% per annum.
- Section 6.2 <u>Development Fee.</u> Promptly following the Financial Closing for the Project, Cibolo Turnpike shall be paid solely from the proceeds of such financing a Development Fee equal to 2% of the principal amount, or if sold at a net premium, issue price, of such financing.
- Section 6.3 <u>Project Management Fee</u>. Cibolo Turnpike is authorized to receive an appropriate Project Management Fee to oversee and manage the development of the Project. The Project Management Fee shall equal to 3% of the estimated construction cost of the Project.

Initials: CITY CIBOLO TURNPIKE Page 14

- Section 6.4 Operating Management Fee. Cibolo Turnpike is authorized to receive an appropriate Operating Management Fee all of which is detailed under the Financial Model or the Operating Agreement, as applicable. The Operating Management Fee is to cover the operations and management of the Project.
- Section 6.5 <u>City</u>. City's compensation shall be an annual split of all remaining Surplus Revenues of the Project, based on the percentages as set forth in the Financial Model, which includes a portion of those surplus funds remaining under the indenture or other documents after providing for: (1) all operation and maintenance expenses, (2) taxes, (3) all debt service on debt incurred to finance or improve the Project, (4) all contractual commitments (5) all required reserves as set forth in the Financial Model, (5) the necessary payments to Cibolo Turnpike to achieve a return on equity based on the Base Case Equity IRR.

ARTICLE VII

CITY RESPONSIBILITIES

- Section 7.1 <u>Cibolo Parkway Project Input, Alignment.</u> The development of Cibolo Parkway is the responsibily of Cibolo Turnpike. The City and Cibolo Turnpike will work together on the development of this portion of the Project. Cibolo Turnpike will seek input on various components of this portion of the Project. City shall offer staff assistance and provide input on the project development. The City shall provide guidance, direction and approval of the alignment of the Cibolo Parkway. Such input and approval on the alignment shall be in a timely manner. The final alignment as agreed to by the parties is not subject to changes and Cibolo Turnpike can rely on that final alignment.
- (a) <u>Cibolo Expressway</u>. The development of Cibolo Expressway will be the responsibility of Cibolo Turnpike. The alignment for Cibolo Expressway has been set as part of the FM 1103 Improvements. Cibolo Turnpike will seek input on the Cibolo Expressway, and the alignment and design for the additional lanes will comport with TxDOT guidelines.
- Section 7.2 TxDOT FM 1103 Turnback. The City, collaboratively with Cibolo Turnpike, will negotiate with TxDOT on the turnback of the FM 1103 Improvements to the City. Negotiation on the FM 1103 Improvements turnback to the City shall begin with the execution of this Agreement. Final acceptance of the FM 1103 Improvements would occur after the results of Project Development Phase I.

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ARTICLE VIII

FINANCING THE PROJECT

Section 8.1 The Project.

(a) Cibolo Turnpike shall be solely responsible for all costs associated with the design and construction of the Project and any debt service related thereto. Cibolo Turnpike may elect to undertake the Project under the Operating Agreement by either Texas Turnpike Corporation or Cibolo Turnpike or an affiliate of them.

ARTICLE IX

OPERATING AGREEMENT

- Section 9.1 Operating Agreement. The Operating Agreement to be negotiated and executed by City, to Cibolo Turnpike, the Texas Turnpike Corporation or other affiliated entity designated by Cibolo Turnpike in accordance with this Agreement, shall be substantially in the form attached to this Agreement as Appendix A. The parties further acknowledge that the evolution of the Project may call for further modifications or amendments to the Operating Agreement and the parties accordingly agree to negotiate in good faith to identify the terms of any amendment that may be reasonably necessary, and to enter into such modifications of the Operating Agreement as are called for either before or after it is executed in order substantially to preserve the economic benefits to both Cibolo Turnpike and City as set forth in the Financial Model.
- Section 9.2 Operating Agreement Terms. Subject to the provisions of 3.1(f), the parties shall use their best efforts to negotiate the terms and provisions of an Operating Agreement prior to the end of Phase I. Such Operating Agreement shall provide, at a minimum:
- (i) The term of the Operating Agreement to run co-terminus with this Agreement;
- (ii) The exclusive right and obligation to manager, operate, and maintain the Project, including toll collections on the tolled portions thereof (being Cibolo Expressway and Cibolo Parkway);
- (iii) Included as part of the Operating Agreement are the following provisions regarding tolled and non-tolled routes:
 - A. Trips beginning or ending on the Cibolo Expressway will not have to pay any toll relating to the Cibolo Expressway only.
 - B. All trips beginning or ending on the Cibolo Parkway shall pay that portion of the tolls applicable to and for such trip.

Initials: CITY CIBOLO TURNPIKE VC Page 16

C. All "through" trips, meaning any trip that does not originate or terminate in the City, shall pay tolls on both the Cibolo Expressway and the Cibolo Parkway; and

(iv) The remaining requirements concering Project operation specified in Section 3.1(e) hereof.

ARTICLE X REPRESENTATIVES

Section 10.1 <u>Cibolo Turnpike's Representative</u>. Upon execution of the Agreement, Cibolo Turnpike shall designate, in writing, to City, the name of the individual who is to be the Cibolo Turnpike representative (the "Cibolo Turnpike's Representative") with full authority to execute any and all instruments requiring Cibolo Turnpike's signature and to act on behalf of Cibolo Turnpike with respect to all matters arising out of this Agreement. Cibolo Turnpike's Representative shall represent the interests of Cibolo Turnpike, be responsible for overseeing all aspects of design, construction and development of the Cibolo Turnpike and Cibolo Expressway, and work closely with City's Representative (as defined below). Any consent, approval, decision or determination hereunder made by Cibolo Turnpike's Representative shall be binding on Cibolo Turnpike; provided, however, Cibolo Turnpike's Representative shall not have any right to modify, waive or amend any provision of the Agreement, or terminate the Agreement.

Section 10.2 City's Representative. Upon execution of this Agreement, City shall designate the City's representative (the "City's Representative") and will provide Cibolo Turnpike with written notice of the identity of such individual so designated. With respect to any action, decision or determination which is to be taken or made by City under the Agreement, City's Representative may take such action or make such decision or determination or shall notify Cibolo Turnpike in writing of the person(s) responsible for such action, decision or determination and shall forward any communications and documentation to such person(s) for response or action. Any consent, approval, decision or determination hereunder by City's Representative shall be binding on City to the extent City has the legal power to delegate to an individual the ability to give such consent or approval or make such decision or determination; provided, however, City's Representative shall not have any right to modify, waive or amend any provision of the Agreement, or terminate the Agreement. Cibolo Turnpike and any Person dealing with City in connection with the Agreement or any matter governed by the Agreement may rely and shall be fully protected in relying upon the authority and capacity of City's Representative or any such designee to act for and bind City in any such matter, to the extent that such delegation of authority is authorized by the City Charter and State law.

From time to time following the execution hereof, Cibolo Turnpike may change or replace Cibolo Turnpike's Representative and City may change or replace City's Representative upon five (5) business days' written notice to the other party, delivered to such party in the manner and at the address indicated in <u>Section 13.7</u> hereof.

Initials: CITY CIBOLO TURNPIKE Page 17

ARTICLE XI

Section 11.1 Events of Default by City. The following shall constitute Events of Default by City under this Agreement:

- Failure to observe or perform any material term, provision, condition or obligation under the Agreement, and failure to cure such default within thirty (30) days following notice or discovery of such default; provided, however, that if the failure to observe or perform cannot reasonably be cured within the thirty (30) day period, the failure to observe or perform will not constitute an Event of Default if City begins corrective action within the thirty (30) day period and thereafter proceeds with reasonable diligence to effect the cure as soon as practicable.
- Any material representation or warranty made by City that is false, misleading or inaccurate in any material respect at the time made.
- The failure of City to honor Cibolo Turnpike's option to enter into the Operating Agreement.
 - (d) Default under the Operating Agreement.
- City shall (i) apply for or consent to, or become subject to, the (e) appointment of or the taking of possession by a receiver, liquidator, custodian or trustee of itself or of all or a substantial part of its property, (ii) admit in writing its inability, or be generally unable, to pay its debts as such debts generally become due, (iii) make a general assignment for the benefit of its creditors, (iv) commence a voluntary case under the Federal Bankruptcy Code (as now or hereafter in effect), (v) file a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or adjustment of debts, (vi) take any action for the purpose of effecting any of the foregoing, or (vii) be adjudicated as bankrupt or insolvent by any court.
- Final legislative, administrative or judicial action after the date hereof that limits City's authority so as to materially and adversely affect its ability to perform its obligations under this Agreement or the Operating Agreement and City does not enter into an amendment to this Agreement as provided in Section 12.3 within thirty (30) days of such final legislative, administrative or judicial action. However, no future legislative changes shall ever cause the financial obligations related to the Tollway to become obligations of the City.
- Section 11.2 Events of Default by Cibolo Turnpike. The following shall constitute Events of Default by Cibolo Turnpike under the Agreement:
- Failure to observe or perform any material term, provision, condition or obligation under the Agreement and failure to cure such default within thirty (30) days following

Initials: CITY

CIBOLO TURNPIKE

Page 18

notice or discovery of such default; provided, however, if the failure to observe or perform cannot reasonably be cured within the thirty (30) day period, the failure to observe or perform will not be an Event of Default if Cibolo Turnpike begins corrective action within the thirty (30) day period and thereafter proceeds with reasonable diligence to effect the cure as soon as practicable.

- (b) Any representation or warranty made by Cibolo Turnpike that is false, misleading or inaccurate in any material respect at the time made.
- (c) Abandonment by Cibolo Turnpike except as specifically permitted by the Agreement.
- (d) Cibolo Turnpike shall (i) apply for or consent to, or become subject to, the appointment of or the taking of possession by a receiver, liquidator, custodian or trustee of itself or of all or a substantial part of its property, (ii) admit in writing its inability, or be generally unable, to pay its debts as such debts generally become due, (iii) make a general assignment for the benefit of its creditors, (iv) commence a voluntary case under the Federal Bankruptcy Code (as now or hereafter in effect), (v) file a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or adjustment of debts, (vi) take any action for the purpose of effecting any of the foregoing, or (viii) be adjudicated as bankrupt or insolvent by any court.

Section 11.3 Remedies for City Default.

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- (a) Upon the occurrence and continuance of an Event of Default by City under the Agreement, which City fails to cure, Cibolo Turnpike may suspend performance under the Agreement and Cibolo Turnpike will have such remedies as may be available to it law or in equity, subject to the limitations on adjudicated awards as set out in Texas Local Government Code Chapter 271 Subchapter I, which shall be controlling.
- (b) Upon the occurrence and continuance of an Event of Default by City under Section 11.1(a) of this Agreement, Cibolo Turnpike shall be entitled to injunctive relief against City.
- (c) Upon the occurrence and continuance of an Event of Default by City under the Agreement, Cibolo Turnpike may terminate this Agreement by delivering notice in writing to City specifying the nature of the Event of Default and establishing a termination date, which date shall not be less than thirty (30) days following the date of delivery of the notice whereupon the Agreement shall terminate on the specified termination date unless City shall have cured the Event of Default by such date, in which case the notice of termination shall be cancelled. Liabilities of City accruing under this Agreement prior to the date of termination shall survive any termination.
- (d) Without prejudice to any other rights and remedies that the other party may have, each of the parties agrees that damages may not be an adequate remedy for a breach of Section 11.1(a) of the Agreement, and that the other party will, in such case, be entitled to the

CIBOLO TURNPIKE Page 19



remedies of injunction, specific performance or other equitable relief for any threatened or actual breach of Section 11.1(a) of this Agreement.

Section 11.4 Remedies for Cibolo Turnpike Default.

- (a) Upon the occurrence and continuance of an Event of Default by Cibolo Turnpike under this Agreement, City may suspend performance under this Agreement and City will have such remedies as may be available under this Agreement.
- (b) Upon the occurrence and continuance of an Event of Default by Cibolo Turnpike under the Agreement, City may terminate this Agreement by delivering notice in writing to Cibolo Turnpike specifying the nature of the Event of Default and establishing a termination date, which date shall be not less than thirty (30) days following the date of delivery of the notice whereupon this Agreement shall terminate on the specified termination date unless Cibolo Turnpike shall have cured the Event of Default by such date, in which case the notice of termination shall be cancelled. Liabilities of Cibolo Turnpike accruing under this Agreement prior to the date of termination shall survive any termination.
- (c) Upon the occurrence and continuance of an Event of Default by Cibolo Turnpike under this Agreement, which Cibolo Turnpike fails to cure, and which constitutes a material misrepresentation, a negligent act or omission, or gross negligence, or recklessness, or willful misconduct by Cibolo Turnpike or any of its partners, contractors, agents or affiliates in connection with the Project or City may suspend performance under this Agreement and the City shall have such remedies as may be available to it law or in equity; including but not limited to recovery of actual damages the City may incur as a result of the breach.
- (d) Without prejudice to any other rights and remedies that the other party may have, each of the parties agrees that damages may not be an adequate remedy for a breach of Section 11.2(a) of the Agreement, and that the other party will, in such case, be entitled to the remedies of injunction, specific performance or other equitable relief for any threatened or actual breach of Section 11.2(a) of the Agreement.
- (e) Upon the occurrence and continuance of an Event of Default by Cibolo Turnpike under Section 11.2(a) of the Agreement, City shall be entitled to injunctive relief against Cibolo Turnpike.

ARTICLE XII

REPRESENTATIONS AND WARRANTIES

- Section 12.1 <u>Cibolo Turnpike's Representations and Warranties</u>. Cibolo Turnpike hereby represents and warrants to City that:
- (a) <u>Organization</u>. Cibolo Turnpike is a Texas limited partnership duly formed, validly existing and in good standing under the laws of the State. Cibolo Turnpike has all requisite power and authority to enter into the Agreement and to perform its obligations hereunder.

Initials: CITY

CIBOLO TURNPIKE

Page 20



- (b) <u>Authorization</u>; <u>No Violation</u>. The execution, delivery and performance by Cibolo Turnpike of this Agreement have been duly authorized by all necessary action and will not violate the organizational documents of Cibolo Turnpike or result in the breach of or constitute a default under any loan or credit agreement, other material agreement, judgment or decree to which Cibolo Turnpike is a party or by which Cibolo Turnpike, or its material assets, may be bound or affected; the Agreement has been duly executed and delivered by Cibolo Turnpike and the Agreement and the documents referred to herein constitute valid and binding obligations of Cibolo Turnpike subject to bankruptcy, reorganization, moratorium and other laws relating to the enforcement of creditors' rights generally and to general equitable principles (regardless of whether enforcement is sought in a proceeding at law or in equity).
- (c) <u>Litigation</u>. No suit is pending against or affecting Cibolo Turnpike which could reasonably be expected to have a material adverse effect upon Cibolo Turnpike's performance under the Agreement or the financial condition or business of Cibolo Turnpike. There are no outstanding judgments against Cibolo Turnpike which would have a material adverse effect upon its assets, properties or franchises.
- (d) <u>No Violation of Laws</u>. Cibolo Turnpike has received no notice as of the date of the Agreement asserting any noncompliance in any material respect by Cibolo Turnpike with applicable statutes, rules and regulations of the United States of America, of the State, or of any other state or municipality or agency having jurisdiction over and with respect to the transactions contemplated in and by this Agreement; and Cibolo Turnpike is not in default with respect to any judgment, order, injunction or decree of any court, administrative agency, or other governmental authority which is in any respect material to the transactions contemplated hereby.
- Section 12.2 <u>City's Representations and Warranties</u>, As of the date of this Agreement, City makes the following representations and warranties to Cibolo Turnpike:
- (a) <u>Organization</u>. City is a public body and a political subdivision of the State and has all requisite power and authority to enter into this Agreement and to perform its obligations hereunder.
- (b) <u>Authorization: No Violation</u>. The execution, delivery and performance by City of this Agreement have been duly authorized by all necessary action and will not violate City's Home Rule Charter, ordinances, resolutions, or any applicable laws, or result in the breach of any material agreement, judgment or decree to which City is a party; this Agreement has been duly executed and delivered by City and the Agreement and the documents referred to herein constitute valid and binding obligations of City enforceable against City in accordance with its terms subject to bankruptcy, reorganization, moratorium and other laws relating to the enforcement of creditors' rights generally and to general equitable principles (regardless of whether enforcement is sought in a proceeding at law or in equity).
- (c) <u>Litigation</u>. No suit is pending against or affecting City which could reasonably be expected to have a material adverse effect upon City's performance under this Agreement.

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(d) No Violation of Laws. City has received no notice as of the date of this Agreement asserting any noncompliance in any material respect by City with applicable statutes, rules and regulations of the United States of America, the State or any agency having jurisdiction over and with respect to the transactions contemplated in and by this Agreement, and City is not in default with respect to any judgment, order, injunction or decree of any court, administrative agency, or other governmental authority which is in any respect material to the transactions contemplated hereby.

Section 12.3 <u>Mutual Representations and Warranties; Restructure Due to Legislative, Administrative or Judicial Actions</u>. In the event of a final legislative, administrative or judicial action after the date hereof that limits Cibolo Turnpike's authority or the City's authority so as to materially and adversely affect either of said party's ability to perform its obligations under this Agreement, City and Cibolo Turnpike will in good faith negotiate changes to this Agreement reasonably acceptable to both parties that accomplish the purposes of this Agreement in a manner that preserves to the extent reasonably possible the economic benefits to both Cibolo Turnpike and City as set forth in the Financial Model.

ARTICLE XIII

MISCELLANEOUS

Section 13.1 <u>Uncontrollable Circumstances</u>. An "Uncontrollable Circumstance" is an event or circumstance, including an action of a governmental entity or a change in law, which prevents a party from performing its obligations under an agreement or which materially increases the time for performing under an agreement, which event or circumstance was not anticipated as of the date of the agreement, which is not within the reasonable control of, or the result of the negligence of, the claiming party, and which, by the exercise of due diligence, the claiming party is unable to overcome or avoid or cause to be avoided. Except as otherwise herein expressly provided, if either City or Cibolo Turnpike shall be delayed or hindered in, or prevented from, the performance of any covenant or obligation hereunder (other than the payment of money), as a result of any Uncontrollable Circumstance, and, provided that the party delayed, hindered or prevented from performing notifies the other party both of the commencement and of the expiration of such delay, hindrance or prevention (each notice being required within ten (10) business days of the respective event), then the performance of such covenant or obligation shall be excused for the period of such delay, hindrance or prevention and the period for the performance of such covenant or obligation shall be extended by the number of days equivalent to the number of days of the impact of such delay, hindrance or prevention. Failure to so provide the foregoing notice will not result in waivers of either an excuse in performance or an extension of time to perform under this Section 13.1 with respect to any such delay, hindrance or prevention.

Section 13.2 <u>Amendment; Waiver</u>. No alteration, amendment or modification hereof shall be valid unless executed by an instrument in writing by City and Cibolo Turnpike with the same formality as this Agreement. The failure of City or Cibolo Turnpike to insist in any one or more instances upon the strict performance of any of the covenants, agreements, terms, provisions or conditions of this Agreement or to exercise any election or option herein contained

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shall not be construed as a waiver or relinquishment for the future of such covenant, agreement, term, provision, condition, election or option, and shall not be deemed to establish a course of conduct among the parties, but the same shall continue and remain in full force and effect. No waiver by City or Cibolo Turnpike of any covenant, agreement, term, provision or condition, election or option of this Agreement shall be deemed to have been made unless expressed in writing and signed by an appropriate official on behalf of Cibolo Turnpike or City. The parties acknowledge that at the time this Agreement is executed, the precise details and scope of the Project have not yet been determined. Moreover, the parties acknowledge and agree that future efforts to pursue the development of the Project will evolve over time, and that subsequent developments may impact the terms of this Agreement and call for a modification or amendment of this Agreement. Accordingly, the parties agree to negotiate mutually and in good faith to enter into such amendments or modifications of this Agreement as may reasonably be indicated by the subsequent details that evolve concerning the Project that preserve the economic benefits to both Cibolo Turnpike and City as set forth in the Financial Model.

Section 13.3 <u>Consent</u>. Unless otherwise specifically provided herein, no consent or approval by City or Cibolo Turnpike permitted or required under the terms of the Agreement shall be valid or be of any validity whatsoever unless the same shall be in writing, signed by the party by or on whose behalf such consent is given.

Section 13.4 <u>Severability</u>. If any provision of this Agreement is held by final judgment of a court of competent jurisdiction to be invalid, illegal or unenforceable, such invalid, illegal or unenforceable provision shall be severed from the remainder of the Agreement, and the remainder of this Agreement shall be enforced. In addition, the invalid, illegal or unenforceable provision shall be deemed to be automatically modified, and, as so modified, to be included in this Agreement, such modification being made to the minimum extent necessary to render the provision valid, legal and enforceable. Notwithstanding the foregoing, however, if the severed or modified provision concerns all or a portion of the essential consideration to be delivered under this Agreement by one party to the other, the remaining provisions of this Agreement shall also be modified to the extent necessary to equitably adjust the parties' respective rights and obligations hereunder.

Section 13.5 <u>Binding Effect</u>. Except as may otherwise be provided herein to the contrary, this Agreement and each of the provisions hereof shall be binding upon and inure to the benefit of Cibolo Turnpike and City, and their respective permitted successors and assigns.

Section 13.6 <u>Relationship of Parties</u>. Nothing contained in this Agreement shall be deemed or construed by City or Cibolo Turnpike hereto or by any third party to create a relationship, partnership, joint venture or any association between Cibolo Turnpike and City.

Section 13.7 Notices. Except as otherwise provided herein, all notices, demands, consents, approvals, statements, requests and invoices to be given under this Agreement shall be in writing, signed by the party or officer, agent or attorney of the party giving the notice, and shall be deemed effective upon receipt if hand delivered or if sent by telecopy with transmission confirmation or overnight courier service; and if sent by the United States mail, postage prepaid,

Initials: CITY CAD CIBOLO TURNPIKE

certified mail, return receipt requested, then it shall be deemed effective three (3) business days

To City:

City of Cibolo 200 S. Main St. Cibolo, Texas 78108

Attn: Robert T. Herrera, City Manager

To Cibolo Turnpike:

Cibolo Turnpike L.P.

25 Highland Park Village #100-758

Dallas, Texas 75205

Attn: John N. Crew, Manager

Either City or Cibolo Turnpike may from time to time by written notice given to the other pursuant to the terms of this Section 13.7 change the address or designees to which notices shall be sent or designate one or more additional Persons to whom notices are to be sent.

This Agreement and any matter relating to this Section 13.8 Governing Law. Agreement, including any matter in contract or tort or in equity or at law, shall be governed by the laws of the State of Texas without regard to principles of conflicts of law that direct the application of the laws of a different state. If the parties do not agree to arbitration with respect to a particular claim or dispute in accordance with the terms of this Agreement, the parties agree that any legal action shall be brought in a state or federal court of competent jurisdiction in Guadalupe County, Texas, and the parties agree to establish venue in such county. The parties further agree that any such lawsuit that may be brought shall be tried by the court, without a jury.

Section 13.9 Effective Date. This Agreement shall be a legally binding agreement, in full force and effect, as of the date set forth in the first paragraph of this Agreement.

City and Cibolo Turnpike shall execute, Section 13.10 Further Assurances. acknowledge and deliver, after the date hereof, without additional consideration, such further assurances, instruments and documents, and shall take such further actions, as Cibolo Turnpike or City shall reasonably request of the other in order to fulfill the intent of this Agreement and the transactions contemplated hereby.

Section 13.11 Third-Party Beneficiary. The provisions of this Agreement are for the exclusive benefit of City and Cibolo Turnpike and not for the benefit of any third person, nor shall this Agreement be deemed to have conferred any rights, express or implied, upon any third person unless otherwise expressly provided for herein.

This Agreement may be executed in two or more Section 13.12 Counterparts. counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

CIBOLO TURNPIKE

Page 24

Section 13.13 <u>Prior Agreements Superseded</u>. This Agreement supersedes any prior understanding or written or oral agreements between City or Cibolo Turnpike respecting the within subject matter, and contains the entire understanding between the parties with respect thereto. There are no oral agreements between City and Cibolo Turnpike.

Section 13.14 <u>Language</u>. The language used in this Agreement shall be deemed to be the language chosen by the parties hereto to express their mutual intent, and no rule of strict construction shall be applied against any party.

Section 13.15 <u>Computing Time</u>, <u>Saturday</u>, <u>Sunday or Holiday</u>. The day of an act, event, or default after which a designated period begins to run is not included when computing a period prescribed or allowed in this Agreement. The last day of the period is included, but if that day is a Saturday, Sunday or legal holiday of the City, the period extends to the end of the next day that is not a Saturday, Sunday or legal holiday.

Section 13.16 <u>Approvals by City</u>. No approval by City shall impose, imply or be construed as an assumption by City of any duties or responsibilities of others with respect to the design or construction of the Project or for the construction means and methods employed by or on behalf of Cibolo Turnpike or any person retained by or on behalf of Cibolo Turnpike.

Section 13.17 <u>Lawsuits</u>. To the extent permitted by law, and without imposing a future debt obligation on the City, City agrees to cooperate with and assist Cibolo Turnpike in connection with initiating or defending any actions, including mediation, arbitration, or state or federal administrative or court proceedings, against or brought by third parties that threaten to stop, delay or increase the cost of (a) completion of the Project, (b) the imposition or collection of any revenue necessary for the funding of the Project, (c) the remediation, if necessary, of the Project Site, and (d) the negotiation, execution, or implementation of this Agreement or any other agreement between City and Cibolo Turnpike or otherwise related to the Project, including the enforcement of any indemnity provisions.

Section 13.18 Attorneys' Fees. In the event of any controversy, claim or dispute between City or Cibolo Turnpike arising from or relating to this Agreement (whether in litigation or arbitration, and including the enforcement of any indemnity provisions), the prevailing party shall be entitled to recover reasonable and necessary costs, expenses and attorneys' fees. For all purposes of this Agreement and any other documents relating to the Agreement, the terms "attorneys' fees" or "counsel fees" shall be deemed to include paralegals' and legal assistants' fees, and wherever provision is made herein or therein for the payment of attorneys' or counsel fees or expenses, such provision shall include such fees and expenses (and any applicable sales taxes thereon) incurred in any and all judicial, bankruptcy, reorganization, administrative or other proceedings, including appellate proceedings, whether such fees or expenses arise before proceedings are commenced or after entry of a final judgment.

Section 13.19 <u>Assignment</u>. Except for the City assignment to an instrumentality upon City creation thereof at any time (which may occur without the consent of Cibolo Turnpike), any assignment by either party must have the written consent of the other, such consent not to be unreasonably withheld. In the event that the City makes an assignment to an instrumentality, City shall notify Cibolo Turnpike thereof. Any purported assignment in violation of this <u>Section</u>

Initials: CITY (AT)

CIBOLO TURNPIKE TIVE

Page 25

13.19 shall be void. This section shall not limit the ability of Cibolo Turnpike to contract with any third party, including its own affiliates, to provide services to or in support of the Project.

Section 13.20 <u>Time of the Essence</u>. Subject to the terms hereof, time is of the essence with respect to the performance of each of the covenants and obligations contained in this Agreement.

Section 13,21 Mediation.

- (a) Any claim, dispute, or other matter in question arising out of or related to the Agreement shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.
- (b) City and Cibolo Turnpike shall endeavor to resolve claims, disputes and other matters in question between them by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association then currently in effect. Request for mediation shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of thirty (30) days from the date of filing unless stayed for a longer period by agreement of the parties or court order.
- (c) City or Cibolo Turnpike agree to split the mediator's fee and any filing fees equally. The mediation shall be held in Guadalupe County, Texas, unless another location is mutually agreed upon. Written agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.
- Section 13.22 <u>Dispute Resolution</u>. Any claim, dispute or other matter in question arising out of or related to this Agreement or otherwise arising from the design and construction of the Project, shall first be subject to mediation in accordance with the provisions of <u>Section 13.21 prior to instituting litigation</u>. Claims, disputes and other matters in question between the parties may be decided by arbitration, but only if both Cibolo Turnpike and City so agree at the time the dispute arises.

Section 13.23 Arbitration. Intentionally deleted.

Section 13.24 <u>Injunctive Relief</u>. Notwithstanding the foregoing, the provisions of <u>Section 13.22</u> and <u>Section 13.23</u> shall not apply to an action for injunctive relief or a writ of mandamus filed in connection with this Agreement.

Initials: CITY CIBOLO TURNPIKE Page 26

Section 13.25 Confidentiality; Open Records Act.

- (a) Each party to this Agreement agrees to keep confidential and not use, reveal, provide or transfer to any third party any Confidential Information (as defined below) it obtains or has obtained concerning the other party to this Agreement or the Project, except as follows:
- (i) subject to <u>Section 13.25(b)</u>, to the extent that disclosure to a third party is required by applicable law or regulation;
- (ii) information which, at the time of disclosure, is generally available to the public (other than as a result of a breach of this Agreement or any other confidentiality agreement to which a party to this Agreement is a party or of which it has knowledge), as evidenced by generally available documents or publications;
- (iii) information that was in its possession prior to disclosure (as evidenced by appropriate written materials) and was not acquired directly or indirectly from any other party to this Agreement;
- (iv) to the extent disclosure is necessary or advisable, to its employees, consultants or advisors, or to its affiliates or their employees, consultants or advisors, in each case solely for the purpose of carrying out their duties under this Agreement;
- (v) to banks or other financial institutions or agencies or any independent accountants or legal counsel or investment advisors employed in connection with the Project, or by any party to this Agreement, to the extent disclosure is necessary or advisable to obtain financing, including, without limitation, the Project financing and the raising of the Development Capital by Cibolo Turnpike;
- (vi) to potential investors in connection with the Project financing and raising the Development Capital;
- (vii) to potential purchasers of a party to this Agreement or any affiliate of a party to this Agreement that directly or indirectly owns an equity interest in such party to this Agreement;
- (viii) to the extent necessary, disclosure to third parties to enforce this Agreement;
 - (ix) to another party to this Agreement; or
- (x) to parties that have signed or agreed to be bound by this confidentiality provision; provided, however, that in each case of disclosure pursuant to (iv), (v), (vi), (vii) or (ix), the persons or entities to whom disclosure is made agree to be bound by this confidentiality provision. The obligation of each party not to disclose Confidential Information except as provided herein shall not be affected by the termination of this Agreement. As used in this Section, the term "Confidential Information" shall mean information, which is clearly marked confidential, concerning this Agreement and the properties, operations, business, trade secrets, technical know-how and other non-public information and data of or relating to the parties to this Agreement or the Project.

Initials: CITY (A)

CIBOLO TURNPIKE W

Page 27

The restrictions on disclosure of Confidential Information set forth above in Section 13.25(a) shall lapse two (2) years from the date of the termination of the Project. In the event a party withdraws from the Project, such party shall remain subject to the restrictions on disclosure of Confidential Information for two (2) years from the date of such party's withdrawal.

If any Person requests City to disclose any Confidential Information under the Texas Open Records Act (Tex. Gov't Code Ann. § 552.001 et seq.) or equivalent or successor statute (the "Open Records Act"), prior to making such disclosure, City shall notify Cibolo Turnpike of such request, in which case Cibolo Turnpike shall promptly and timely inform City whether any of the requested materials constitute confidential, proprietary, commercial, financial or trade secret information of Cibolo Turnpike which may be exempted from disclosure under the Open Records Act, and, in that event, City and Cibolo Turnpike shall cooperate with each other in preparing appropriate responses or filings to the Attorney General of the State and to any Person making such request, including any appeals involved therein, to prevent a disclosure of such information. In such event, each party shall further cooperate with the other to promptly identify any possible third party whose privacy or property interests may be implicated by any such request to disclose information in order to enable Cibolo Turnpike to timely furnish to any such third party any statutory notice required by the Open Records Act and seek any applicable exemptions from disclosure under the Open Records Act. So long as Cibolo Turnpike is pursuing the actions described above in a timely manner, City shall protect confidential, proprietary or trade secret information of Cibolo Turnpike as to which Cibolo Turnpike requests City to do so, unless otherwise compelled by court order, or by opinion of the Texas Attorney General. All reasonable and necessary costs associated with City's cooperation with Cibolo Turnpike hereunder in connection with any proceedings shall be borne by Cibolo Turnpike, and City shall be fully reimbursed for any of such costs it has reasonably incurred including reasonable attorneys' fees.

Section 13.26 No Recourse to Cibolo Turnpike. The obligations of Cibolo Turnpike under this Agreement are recourse solely to the interest of Cibolo Turnpike in the Project. No recourse or liability shall be had against any director, officer, employee, agent, member shareholder or partner of Cibolo Turnpike or of Texas Turnpike Corporation or their respective affiliates.

Waiver of DTPA. CITY AND CIBOLO TURNPIKE HAVE ASSESSED THEIR RESPECTIVE RIGHTS, LIABILITIES AND OBLIGATIONS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION ACT, SECTION 17.41 ET SEQ., BUSINESS & COMMERCE CODE (THE "DTPA"). THE PARTIES AGREE THAT THE DTPA DOES NOT APPLY TO EITHER CITY OR CIBOLO TURNPIKE BECAUSE NEITHER QUALIFY AS A "CONSUMER" UNDER SECTION 17.45(4) OF THE DTPA. BUT IN THE EVENT THE DTPA IS DEEMED TO BE APPLICABLE BY A COURT OF COMPETENT JURISDICTION, CITY AND CIBOLO TURNPIKE HEREBY WAIVE THEIR RIGHTS UNDER THE DTPA, A LAW THAT GIVES CONSUMER SPECIAL RIGHTS AND AFTER CONSULTATION WITH ATTORNEYS OF THEIR OWN PROTECTIONS. SELECTION, CITY AND CIBOLO TURNPIKE CONSENT TO THIS WAIVER. PARTIES AGREE THAT THIS SECTION 13.27 CONSTITUTES A CONSPICUOUS [Signature page follows.] LEGEND.

CIBOLO TURNPIKE

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their proper officers respectively, being thereunto duly authorized, and their respective seals to be hereto affixed, as of the day and year first above written.

City of Cibolo:

Allen Dunn

Mayor, City of Cibolo

Attest:

By: Peggy Cimics, City Secretary

Cibolo Turnpike:

On behalf of CIBOLO TURNPIKE, LP, a Texas limited partnership

CIBOLO TURNPIKE, GP, LLC, By:

a Texas limited liability company, its General Partner

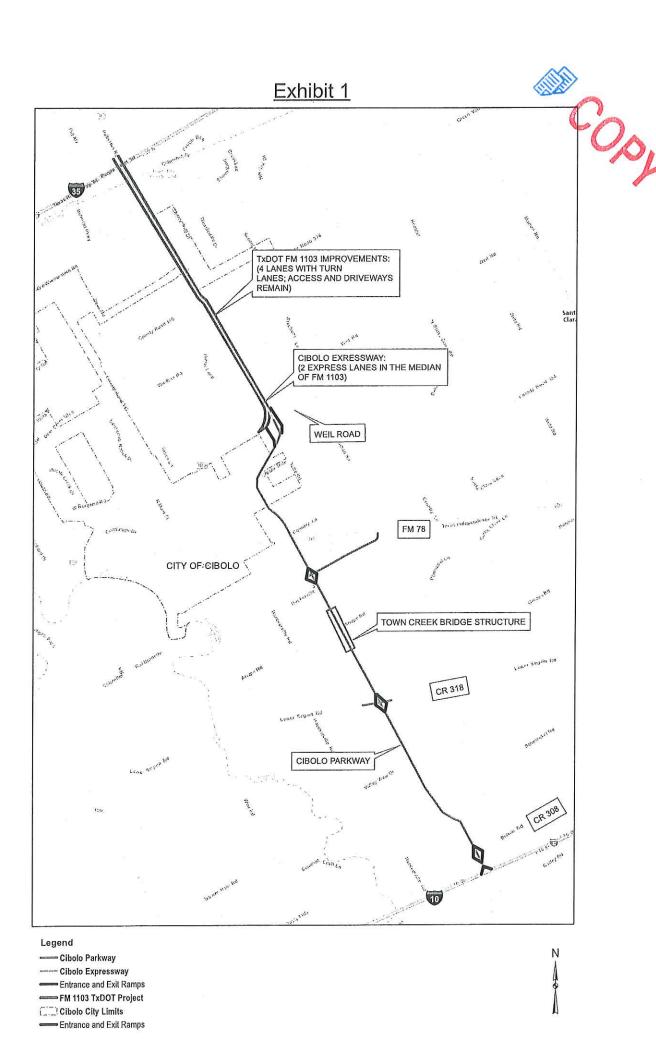
By: TEXAS TURNPIKE CORPORATION, a Texas corporation, its Sole Member and

Sole Manager

John N. Crew, President and Chief Executive Officer

EXHIBIT 1 PROJECT MAP







TTC Draft: 02/24/2017



OPERATING AGREEMENT

between

the City of Cibolo, Texas

and

Cibolo Turnpike L.P.

OPERATING AGREEMENT



This Operating Agreement (the "Agreement") is made and entered into as of ______, 2017 (the "Effective Date"), by and between the City of Cibolo, Texas ("City"), and Cibolo Turnpike L.P., a Texas limited partnership ("Cibolo Turnpike").

PROJECT OVERVIEW

The Project that is the subject of this Agreement is comprised of three interrelated projects the Cibolo Parkway which is the design, build, finance, operate and maintain a new tollroad facility extending approximately 7 miles from the intersection of Weil Road and FM 1103 southeast to IH 10, the "Cibolo Parkway"; the FM 1103 Improvements which consists of the improvements to FM 1103 from IH 35 to Rodeo Way, the "FM 1103 Improvements"; and Cibolo Expressway which consists of adding two express lanes in the median of FM 1103 from IH 35 to Weil Road approximately 4 miles, the "Cibolo Expressway." Collectively the "Project" includes the Cibolo Parkway, the FM 1103 Improvements, and the Cibolo Expressway, each more fully described herein, and as shown on the Project map, Exhibit 1, attached hereto and incorporated by reference.

RECITALS

- A. The Parties have entered into a Development Agreement dated as of ______, 2017 (the "Development Agreement") pursuant to which Cibolo Turnpike will develop the Project.
- B. In accordance with the plan described in the Development Agreement, this Agreement sets forth the terms upon which Cibolo Turnpike will operate and maintain the Project as a City owned facility.
- NOW, THEREFORE, in consideration of the premises, covenants, agreements and obligations contained herein, the parties do hereby agree as follows:

ARTICLE I

SUBJECT OF AGREEMENT

Section 1.1 <u>Purpose of This Agreement</u>. The purpose of this Agreement is to effectuate the operation, management, and maintenance of the Project. This Agreement defines the operating terms mutually agreed upon by the Parties.

Section 1.2 Parties to This Agreement

(a) The City is a home rule municipality, exercising governmental functions and powers as a home rule city in the State of Texas. The "City," as used in this Agreement includes the City of Cibolo, Texas, and any assignee of, instrumentality of, or successor to its rights, powers, and responsibilities.

TTC Draft: 02/24/2017

(b) Cibolo Turnpike, LP, is a Texas limited partnership and Cibolo Turnpike, GP, LLC, a Texas limited liability company, is its sole general partner created for the development and operation of the Project.

ARTICLE II

GRANT OF AUTHORITY AND TERM

- Section 2.1 Term. This Operating Agreement shall be for a term of fifty (50) years, plus additional time, as needed to conform with the Financial Model, beginning on the Effective Date as defined herein (the "Term"). The Development Agreement as part of this program will run co-terminus with this Operating Agreement.
- Section 2.2 <u>Authorization</u>. The City hereby authorizes, permits and grants a non-exclusive right to Cibolo Turnpike, and to all agents, representatives, consultants, contractors, employees, and invitees of Cibolo Turnpike, easement, right-of-way, ingress, egress, access, and use rights in, over, upon, across and along all ingress, egress and access portions of all streets adjacent to the Project belonging to the City, to Cibolo Turnpike for the operation and maintenance of the the Project and/or otherwise as provided for in this Agreement. Any temporary road closures and / or temporary detours will be coordinated with the City.
- Section 2.3 Operations in General. The Cibolo Turnpike agrees to manage and operate the Project in a professional, efficient and businesslike manner, consistent with prevailing good practices for the operation of a tollroad in Texas. The operations and procedures shall be conducted in all material respects in conformity with a procedures manual that details the specifics on the operations and maintenance of the Project, the "Operations and Maintenance Procedures Manual." This Operations and Maintenance Procedures Manual will be developed by Cibolo Turnpike with assistance and guidance from TxDOT and the City. The Operations and Maintenance Procedures Manual will be presented to the City for approval.
- Section 2.4 <u>Grant of Rights.</u> The City hereby grants to Cibolo Turnpike the exclusive right, acting through its contractors, subcontractors, agents and employees, to manage and control all aspects of the operation and management of the Project, subject to the terms of this Agreement and to the provisions of the Operations and Maintenance Procedures Manual.

ARTICLE III

OPERATIONS - COOPERATION

Section 3.1 Level of Effort; Cooperation.

(a) Under this Agreement, Cibolo Turnpike shall be obligated to use its commercially reasonable efforts in the operation of the toll roads; provided, however, it shall not



be obligated to fund those operations from its own resources, and its obligation to provide financing shall be only as set forth in the Development Agreement.

(b) Subject to the other provisions of this Agreement, the parties hereto shall cooperate fully with each other and their respective officers, directors, employees, agents, counsel, accountants and other designees in connection with any steps required to be taken to promote the financial viability of the Project.

ARTICLE IV

TOLL RATES; REPORTS

Section 4.1 <u>Toll Rates</u>. Cibolo Turnpike will at all times fix charge and collect such tolls as are required in order that toll revenues equal 1.50 times the net revenue requirement (as defined in the Financial Model) for each year. The toll rates will be established as part of the Financial Model for the Project, and such rates shall be presented to the City Council before implementation. Financial Model means the computerized financial model including projected revenues, expenses, projections and assumptions for operation of the Project showing, among other things: (a) costs for the operation and maintenance of the Project, including management payments to Cibolo Turnpike for its operation of the Project; (b) debt service costs for debt incurred by Cibolo Turnpike related to the Project; (c) reserves for operations and for capital improvements or such other reserves as may be required by sound engineering practice; (d) payments to Cibolo Turnpike as a return on equity invested by its partners, based on the Base Case Equity IRR, as defined and set forth in the Financial Model; and (e) payments to the City and Cibolo Turnpike as a split of all remaining revenues from the operation of the Project, based on the percentages as set forth in the Financial Model.

Section 4.2 <u>Changes in Rates</u>. Included within the Financial Model will be a schedule of toll rates that will provide sufficient revenue in the following year. If Cibolo Turnpike determines that revenue projections are inadequate to meet the requirements as set forth in the Financial Model, it will have a traffic engineering study performed so as to recommend a new schedule of tolls which will then provide for sufficient revenue projections in the following year to comply with the Financial Model. Cibolo Turnpike shall present the schedule of toll rates to the City and shall notify the City of any potential increase of toll rates at least 90 days before such increases are effective.

Section 4.3 <u>Annual Report.</u> Cibolo Turnpike shall provide an annual report to the City 90 days following each anniversary date of toll operations. The Annual Report shall contain the following: Strategic Plan, Revenue Report, Expense Report, Roadway Conditions, a summary of Cibolo Turnpike's annual audited financial statements; and information by which the City can verify the amounts payable to the City under this Agreement.

ARTICLE V

COMPENSATION



- Section 5.1 <u>Compensation / Revenue Sharing.</u> This section details the anticipated Compensation and Revenue Sharing associated with the Project. Any revenue sharing will be based on the Financial Model as developed for the Project. If Cibolo Turnpike has undertaken the construction and operation of the Project, Cibolo Turnpike's and City's compensation or return shall be payable annually in the following order of priority from the Project revenues remaining after payment of:
- (a) Expenses: operation and maintenance expenses on the Project; taxes on the Project; management fees; reserves for capital improvements to the Project as set forth in the Financial Model or as otherwise required by sound engineering practice; all contract payments; and Debt service on debt incurred by Cibolo Turnpike to finance or improve the Project.
 - (b) Distribution Priority:
- (i) Payment to Cibolo Turnpike as a return on equity based on the Base Case Equity IRR; then
- (ii) A split of all remaining revenue of the Project, based on the percentages as set forth in the Financial Model.

ARTICLE VI

CITY RESPONSIBILITIES

- Governmental Approvals. City shall assist Cibolo Turnpike in obtaining Section 6.1 all governmental approvals required for the operation of the Project. To the extent application for a governmental approval must be made in the name of City. City authorizes Cibolo Turnpike (a) to prepare and submit to the permitting entity such information and analysis as may be required or requested by such entity, (b) to complete such forms, applications or other agreements that may be required to be executed by City, (c) to negotiate and otherwise develop appropriate permit conditions and (d) to take all other actions reasonably required to obtain governmental approvals. If required by law, and notwithstanding any provision in this Agreement to the contrary, City will execute such forms, applications or other agreements as may be reasonably requested by Cibolo Turnpike in order to obtain governmental approvals subject to review by City. Notwithstanding any provision in this Agreement to the contrary, City agrees to accept any governmental approval that must be issued in the name of City as may be required for the development, construction or operation of all or any portion of the Project, provided that the governmental approval does not impose any financial obligation on City, nor any conditions on City that materially and adversely affect any operation of City.
- Section 6.2 <u>Tax Benefits</u>. If Cibolo Turnpike reasonably determines that (commercially reasonable) structural or contractual arrangements related to the Project will maximize the availability of tax or other state or federal government benefits, City shall approve such structural or contractual arrangements and take such other actions as are necessary to maximize the availability of such benefits, including, without limitation City's actions in entering into an operating or similar agreement for any future portion of the Project to Cibolo Turnpike, or its affiliate or designee to obtain the benefits of depreciation deductions, tax credits or similar tax benefits.



ARTICLE VII

OTHER PROVISIONS

Section 7.1 Other Provisions. This Agreement has or requires:

- (i) The exclusive right to operate and maintain the Project, subject to the terms of this Agreement;
- (ii) The unrestricted ability to impose and raise tolls on the Project in order to meet all necessary financial obligations as established in the Financial Model subject to the terms of this Agreement;
- (iii) Cibolo Turnpike shall maintain during the term of this Agreement market insurance provisions related to the operation of the Project;
- (iv) Agreement of City to cooperate and assist with all required governmental approvals, including, but not limited to, environmental approvals required in the operation of the Project;
- (v) Agreement of City to coordinate with the TxDOT and any other governmental authority in an effort to acquire any additional rights of way or sites for any future expansion of the Project through the use of existing or acquired road rights of way or other locations;
- (vi) In recognition of City's development of the Project the following provisions regarding tolled and non-tolled routes are not subject to amendment, unless at the City's sole discretion, the City determines to make an adjustment or amendment:
 - A. Trips beginning or ending on the Cibolo Expressway will not have to pay any toll relating to the Cibolo Expressway only.
 - B. All trips beginning or ending on the Cibolo Parkway shall pay that portion of the tolls applicable to and for such trip.
 - C. All through trips -any trip that does not orginate or terminate in the City shall pay tolls on both the Cibolo Expressway and the Cibolo Parkway.
- (vii) The following vehicles shall not be subject to any toll for travel on the Project: official City of Cibolo vehicles, official City of Schertz vehicles, official Schertz-Cibolo-Universal City Independent School District vehicles, and official Guadalupe County Sheriff's Office vehicles, vehicles being used by an entity to provide emergency services to the City of Cibolo under contract; or such other vehicles exempted by state law from the payment of tolls.
- (viii) Notwithstanding any provision to the contrary nothing in this Agreement shall be construed to require the City to enter into any "non-compete" agreement; and no contract authorized under this Agreement shall ever negate or diminish the City Council's authority to plan, fund and construct future streets, roads, highways, mass transit, or other such improvements as City Council may, in its sole discretion, find necessary to address the



transportation needs of the City and its citizens. Further, should such a "non-compete" provision be incorporated in any contract or agreement authorized by this Agreement, it shall be void ab initio.

- (ix) Operator's insurance requirements (worker's comp., automobile, liability) Cibolo Turnpike will provide the appropriate operator's insurance for the Project, including worker's comp, and general liability coverage (the "Insurance Coverage"). The Insurance Coverage consistent with the City coverages and requirements and such insurance will be included and delineated within the Operation and Maintenance Procedures Manual.
- Section 7.2 <u>Indemnification</u>. Cibolo Turnpike shall indemnify, defend and hold harmless the City and its respective City Council members, officers, employees, representatives, attorneys and agents (the "City Indemnitees") from any losses or claims that may at any time be imposed upon, asserted against or incurred by any City Indemnitee, to the extent such losses arise out of:
- (a) The inaccuracy in any material respect of any representation or warranty of Cibolo Turnpike contained herein or the failure of Cibolo Turnpike in any material respect to comply with any of its obligations under this Agreement; or
- (b) Cibolo Turnpike's breach of a contract with a third party, or the negligent acts or omissions, or the gross negligence, or the recklessness, or the willful misconduct of Cibolo Turnpike or any of its partners, contractors, agents or affiliates in connection with the Project.

ARTICLE VIII

CITY'S RIGHT TO EARLY BUY OUT THE PROJECT

Section 8.1 If the City wishes to terminate this Agreement without cause, it will require them to provide for a one-time termination payment which shall include; (1) amounts sufficient to pay all debt incurred by Cibolo Turnpike in connection with financing the Project; (2) any swap termination payments related to any debt incurred in connection with the Project; and, (3) a make-whole payment in U.S. dollars equal to the Net Present Value of all future Distributions, through the complete term of this Agreement, as indicated by the Financial Model. The discount rate to be used on such calculation shall be the 20 year U.S. Treasury Bond rate or the Prime Rate, whichever is lower, on the day prior to closing as shown in the Wall Street Journal or, if not available there, then some other nationally recognized daily financial publication.

ARTICLE IX



REPRESENTATIVES

Section 9.1 <u>Cibolo Turnpike's Representative</u>. Upon execution of the Agreement, Cibolo Turnpike shall designate, in writing, to City, the name of the individual who is to be the Cibolo Turnpike representative (the "Cibolo Turnpike's Representative") with full authority to execute any and all instruments requiring Cibolo Turnpike's signature and to act on behalf of Cibolo Turnpike with respect to all matters arising out of this Agreement. Cibolo Turnpike's Representative shall represent the interests of Cibolo Turnpike, be responsible for overseeing all aspects of design, construction and development of the City Facilities, and work closely with City's Representative (as defined below). Any consent, approval, decision or determination hereunder made by Cibolo Turnpike's Representative shall be binding on Cibolo Turnpike; provided, however, Cibolo Turnpike's Representative shall not have any right to modify, waive or amend any provision of the Agreement, or terminate the Agreement.

Section 9.2 <u>City's Representative</u>. Upon execution of this Agreement, City shall designate a board member to be City's representative (the "City's Representative") and provide Cibolo Turnpike with written notice of the identity of such individual so designated. With respect to any action, decision or determination which is to be taken or made by City under the Agreement, City's Representative may take such action or make such decision or determination or shall notify Cibolo Turnpike in writing of the person(s) responsible for such action, decision or determination and shall forward any communications and documentation to such person(s) for response or action. Any consent, approval, decision or determination hereunder by City's Representative shall be binding on City to the extent City has the legal power to delegate to an individual the ability to give such consent or approval or make such decision or determination; provided, however, City's Representative shall not have any right to modify, waive or amend any provision of the Agreement, or terminate the Agreement. Cibolo Turnpike and any Person dealing with City in connection with the Agreement or any matter governed by the Agreement may rely and shall be fully protected in relying upon the authority and capacity of City's Representative or any such designee to act for and bind City in any such matter.

From time to time following the execution hereof, Cibolo Turnpike may change or replace Cibolo Turnpike's Representative and City may change or replace City's Representative upon five (5) business days' written notice to the other party, delivered to such party in the manner and at the address indicated in Section 12.7 hereof.

ARTICLE X

DEFAULT, ABANDONMENT

Section 10.1 <u>Events of Default by City</u>. The following shall constitute Events of Default by City under this Agreement:

(a) Failure to observe or perform any material term, provision, condition or obligation under the Agreement, and failure to cure such default within thirty (30) days following notice or discovery of such default; provided, however, that if the failure to observe or



perform cannot reasonably be cured within the thirty (30) day period, the failure to observe or perform will not constitute an Event of Default if City begins corrective action within the thirty (30) day period and thereafter proceeds with reasonable diligence to effect the cure as soon as practicable.

- (b) Any material representation or warranty made by City that is false, misleading or inaccurate in any material respect at the time made.
- (c) City shall (i) apply for or consent to, or become subject to, the appointment of or the taking of possession by a receiver, liquidator, custodian or trustee of itself or of all or a substantial part of its property, (ii) admit in writing its inability, or be generally unable, to pay its debts as such debts generally become due, (iii) make a general assignment for the benefit of its creditors, (iv) commence a voluntary case under the Federal Bankruptcy Code (as now or hereafter in effect), (v) file a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or adjustment of debts, (vi) take any action for the purpose of effecting any of the foregoing, or (vii) be adjudicated as bankrupt or insolvent by any court.
- (d) Final legislative, administrative or judicial action after the date hereof that limits City's authority so as to materially and adversely affect its ability to perform its obligations under this Agreement and City does not enter into an amendment to this Agreement as provided in Section 11.3 within thirty (30) days of such final legislative, administrative or judicial action. However, no future legislative changes shall ever cause the financial obligations related to the Project to become obligations of the City.
- Section 10.2 <u>Events of Default by Cibolo Turnpike</u>. The following shall constitute Events of Default by Cibolo Turnpike under the Agreement:
- (a) Failure to observe or perform any material term, provision, condition or obligation under the Agreement and failure to cure such default within thirty (30) days following notice or discovery of such default; provided, however, if the failure to observe or perform cannot reasonably be cured within the thirty (30) day period, the failure to observe or perform will not be an Event of Default if Cibolo Turnpike begins corrective action within the thirty (30) day period and thereafter proceeds with reasonable diligence to effect the cure as soon as practicable.
- (b) Any representation or warranty made by Cibolo Turnpike that is false, misleading or inaccurate in any material respect at the time made.
- (c) Abandonment by Cibolo Turnpike except as specifically permitted by the Agreement.
- (d) Cibolo Turnpike shall (i) apply for or consent to, or become subject to, the appointment of or the taking of possession by a receiver, liquidator, custodian or trustee of itself or of all or a substantial part of its property, (ii) admit in writing its inability, or be generally unable, to pay its debts as such debts generally become due, (iii) make a general assignment for the benefit of its creditors, (iv) commence a voluntary case under the Federal Bankruptcy Code (as now or hereafter in effect), (v) file a petition seeking to take advantage of any other law



relating to bankruptcy, insolvency, reorganization, winding-up, or composition or adjustment of debts, (vi) take any action for the purpose of effecting any of the foregoing, or (viii) be adjudicated as bankrupt or insolvent by any court.

Section 10.3 Remedies for City Default.

- (a) Upon the occurrence and continuance of an Event of Default by City under the Agreement, Cibolo Turnpike may suspend performance under the Agreement and Cibolo Turnpike will have such remedies as may be available to it law or in equity.
- (b) Upon the occurrence and continuance of an Event of Default by City under Section 10.1(a) of this Agreement, Cibolo Turnpike shall be entitled to injunctive relief against City.
- (c) Upon the occurrence and continuance of an Event of Default by City under the Agreement, Cibolo Turnpike may terminate this Agreement by delivering notice in writing to City specifying the nature of the Event of Default and establishing a termination date, which date shall not be less than thirty (30) days following the date of delivery of the notice whereupon the Agreement shall terminate on the specified termination date unless City shall have cured the Event of Default by such date, in which case the notice of termination shall be cancelled. Liabilities of City accruing under this Agreement prior to the date of termination shall survive any termination.
- (d) Without prejudice to any other rights and remedies that the other party may have, each of the parties agrees that damages may not be an adequate remedy for a breach of Section 10.1(a) of the Agreement, and that the other party will, in such case, be entitled to the remedies of injunction, specific performance or other equitable relief for any threatened or actual breach of Section 10.1(a) of this Agreement.

Section 10.4 Remedies for Cibolo Turnpike Default.

- (a) Upon the occurrence and continuance of an Event of Default by Cibolo Turnpike under this Agreement, City may suspend performance under this Agreement and City will have such remedies as may be available under this Agreement.
- (b) Upon the occurrence and continuance of an Event of Default by Cibolo Turnpike under the Agreement, City may terminate this Agreement by delivering notice in writing to Cibolo Turnpike specifying the nature of the Event of Default and establishing a termination date, which date shall be not less than one hundred and twenty (120) days following the date of delivery of the notice whereupon this Agreement shall terminate on the specified termination date unless Cibolo Turnpike shall have cured the Event of Default by such date, in which case the notice of termination shall be cancelled. Liabilities of Cibolo Turnpike accruing under this Agreement prior to the date of termination shall survive any termination.
- (c) Upon the occurrence and continuance of an Event of Default by Cibolo Turnpike under this Agreement, which Cibolo Turnpike fails to cure, and which constitutes a material misrepresentation, gross negligence, or recklessness, or willful misconduct by Cibolo Turnpike or any of its partners, contractors, agents or affiliates in connection with the Project, the



City may suspend performance under this Agreement and the City shall have such remedies as may be available to it by law or in equity; including but not limited to recovery of actual damages the City may incur as a result of the breach.

- (d) Without prejudice to any other rights and remedies that the other party may have, each of the parties agrees that damages may not be an adequate remedy for a breach of Section 10.1(a) of this Agreement, and that the other party will, in such case, be entitled to the remedies of injunction, specific performance or other equitable relief for any threatened or actual breach of Section 10.1(a) of this Agreement.
- (e) Upon the occurrence and continuance of an Event of Default by Cibolo Turnpike under Section 10.2(a) of this Agreement, City shall be entitled to injunctive relief against Cibolo Turnpike.

ARTICLE XI

REPRESENTATIONS AND WARRANTIES

- Section 11.1 <u>Cibolo Turnpike's Representations and Warranties</u>. Cibolo Turnpike hereby represents and warrants to City that:
- (a) <u>Organization</u>. Cibolo Turnpike is a Texas limited partnership duly formed, validly existing and in good standing under the laws of the State. Cibolo Turnpike has all requisite power and authority to enter into the Agreement and to perform its obligations hereunder.
- (b) <u>Authorization; No Violation</u>. The execution, delivery and performance by Cibolo Turnpike of this Agreement have been duly authorized by all necessary action and will not violate the organizational documents of Cibolo Turnpike or result in the breach of or constitute a default under any loan or credit agreement, other material agreement, judgment or decree to which Cibolo Turnpike is a party or by which Cibolo Turnpike, or its material assets, may be bound or affected; the Agreement has been duly executed and delivered by Cibolo Turnpike and the Agreement and the documents referred to herein constitute valid and binding obligations of Cibolo Turnpike subject to bankruptcy, reorganization, moratorium and other laws relating to the enforcement of creditors' rights generally and to general equitable principles (regardless of whether enforcement is sought in a proceeding at law or in equity).
- (c) <u>Litigation</u>. No suit is pending against or affecting Cibolo Turnpike which could reasonably be expected to have a material adverse effect upon Cibolo Turnpike's performance under the Agreement or the financial condition or business of Cibolo Turnpike. There are no outstanding judgments against Cibolo Turnpike which would have a material adverse effect upon its assets, properties or franchises.
- (d) <u>No Violation of Laws</u>. Cibolo Turnpike has received no notice as of the date of this Agreement asserting any noncompliance in any material respect by Cibolo Turnpike with applicable statutes, rules and regulations of the United States of America, of the State, or of any other state or municipality or agency having jurisdiction over and with respect to the transactions contemplated in and by this Agreement; and Cibolo Turnpike is not in default with



respect to any judgment, order, injunction or decree of any court, administrative agency, or other governmental authority which is in any respect material to the transactions contemplated hereby.

- Section 11.2 <u>City's Representations and Warranties</u>. As of the date of this Agreement, City makes the following representations and warranties to Cibolo Turnpike:
- (a) <u>Organization</u>. City is a public body and a political subdivision of the State and has all requisite power and authority to enter into the Agreement and to perform its obligations hereunder.
- (b) <u>Authorization; No Violation</u>. The execution, delivery and performance by City of the Agreement have been duly authorized by all necessary action and will not violate City's articles of incorporation or bylaws or any applicable laws, or result in the breach of any material agreement, judgment or decree to which City is a party; the Agreement has been duly executed and delivered by City and the Agreement and the documents referred to herein constitute valid and binding obligations of City enforceable against City in accordance with its terms subject to bankruptcy, reorganization, moratorium and other laws relating to the enforcement of creditors' rights generally and to general equitable principles (regardless of whether enforcement is sought in a proceeding at law or in equity).
- (c) <u>Litigation</u>. No suit is pending against or affecting City which could reasonably be expected to have a material adverse effect upon City's performance under this Agreement.
- (d) <u>No Violation of Laws</u>. City has received no notice as of the date of this Agreement asserting any noncompliance in any material respect by City with applicable statutes, rules and regulations of the United States of America, the State or any agency having jurisdiction over and with respect to the transactions contemplated in and by this Agreement; and City is not in default with respect to any judgment, order, injunction or decree of any court, administrative agency, or other governmental authority which is in any respect material to the transactions contemplated hereby.
- Section 11.3 <u>Mutual Representations and Warranties; Restructure Due to Legislative, Administrative or Judicial Actions.</u> In the event of a final legislative, administrative or judicial action after the date hereof that limits Cibolo Turnpike's authority or the City's authority so as to materially and adversely affect either of said party's ability to perform its obligations under this Agreement, City and Cibolo Turnpike will in good faith negotiate changes to this Agreement reasonably acceptable to both parties that accomplish the purposes of this Agreement in a manner that preserves to the extent reasonably possible the economic benefits to both Cibolo Turnpike and City as set forth in the Financial Model.

ARTICLE XII

MISCELLANEOUS

Section 12.1 <u>Uncontrollable Circumstances</u>. An uncontrollable circumstance is an event or circumstance, including an action of a governmental entity or a change in law, which prevents a party from performing its obligations under an agreement or which materially increases the time or cost for performing under an agreement, which event or circumstance was



not anticipated as of the date of the agreement, which is not within the reasonable control of, or the result of the negligence of, the claiming party, and which, by the exercise of due diligence, and commercially reasonable efforts, the claiming party is unable to overcome or avoid or cause to be avoided ("Uncontrollable Circumstance"). Except as otherwise herein expressly provided, if either City or Cibolo Turnpike shall be delayed or hindered in, or prevented from, the performance of any covenant or obligation hereunder (other than the payment of money), as a result of any Uncontrollable Circumstance, and, provided that the party delayed, hindered or prevented from performing notifies the other party both of the commencement and of the expiration of such delay, hindrance or prevention (each notice being required within ten (10) business days of the respective event), then the performance of such covenant or obligation shall be excused for the period of such delay, hindrance or prevention and the period for the performance of such covenant or obligation shall be extended by the number of days equivalent to the number of days of the impact of such delay, hindrance or prevention. Failure to so provide the foregoing notice will not result in waivers of either an excuse in performance or an extension of time to perform under this Section 12.1 with respect to any such delay, hindrance or prevention.

Section 12.2 Amendment; Waiver. No alteration, amendment or modification hereof shall be valid unless executed by an instrument in writing by City and Cibolo Turnpike with the same formality as this Agreement. The failure of City or Cibolo Turnpike to insist in any one or more instances upon the strict performance of any of the covenants, agreements, terms, provisions or conditions of this Agreement or to exercise any election or option herein contained shall not be construed as a waiver or relinquishment for the future of such covenant, agreement, term, provision, condition, election or option, and shall not be deemed to establish a course of conduct among the parties, but the same shall continue and remain in full force and effect. No waiver by City or Cibolo Turnpike of any covenant, agreement, term, provision or condition, election or option of this Agreement shall be deemed to have been made unless expressed in writing and signed by an appropriate official on behalf of Cibolo Turnpike or City. The parties acknowledge that at the time this Agreement is executed, the precise details and scope of the Project have not yet been determined. Moreover, the parties acknowledge and agree that future efforts for the operation of the Project will evolve over time, and that subsequent developments may impact the terms of this Agreement and call for a modification or amendment of this Agreement. Accordingly, the parties agree to negotiate mutually and in good faith to enter into such amendments or modifications of this Agreement as may reasonably be indicated by the subsequent details that evolve concerning the Project that preserve the economic benefits to both Cibolo Turnpike and City as set forth in the Financial Model

Section 12.3 <u>Consent</u>. Unless otherwise specifically provided herein, no consent or approval by City or Cibolo Turnpike permitted or required under the terms of the Agreement shall be valid or be of any validity whatsoever unless the same shall be in writing, signed by the party by or on whose behalf such consent is given.

Section 12.4 <u>Severability</u>. If any provision of this Agreement is held by final judgment of a court of competent jurisdiction to be invalid, illegal or unenforceable, such invalid, illegal or unenforceable provision shall be severed from the remainder of this Agreement, and the remainder of this Agreement shall be enforced. In addition, the invalid, illegal or unenforceable provision shall be deemed to be automatically modified, and, as so modified, to be included in



this Agreement, such modification being made to the minimum extent necessary to render the provision valid, legal and enforceable. Notwithstanding the foregoing, however, if the severed or modified provision concerns all or a portion of the essential consideration to be delivered under this Agreement by one party to the other, the remaining provisions of this Agreement shall also be modified to the extent necessary to equitably adjust the parties' respective rights and obligations hereunder.

Section 12.5 <u>Binding Effect</u>. Except as may otherwise be provided herein to the contrary, this Agreement and each of the provisions hereof shall be binding upon and inure to the benefit of Cibolo Turnpike and City, and their respective permitted successors and assigns.

Section 12.6 <u>Relationship of Parties</u>. Nothing contained in this Agreement shall be deemed or construed by City or Cibolo Turnpike hereto or by any third party to create a relationship, partnership, joint venture or any association between Cibolo Turnpike and City.

Section 12.7 <u>Notices</u>. Except as otherwise provided herein, all notices, demands, consents, approvals, statements, requests and invoices to be given under this Agreement shall be in writing, signed by the party or officer, agent or attorney of the party giving the notice, and shall be deemed effective upon receipt if hand delivered or if sent by telecopy with transmission confirmation or overnight courier service; and if sent by the United States mail, postage prepaid, certified mail, return receipt requested, then it shall be deemed effective three (3) business days after mailing or the date of refusal, addressed as follows:

To City:

City of Cibolo 200 S. Main St. Cibolo, Texas 78108

Attn: Robert T. Herrera, City Manager

To Cibolo Turnpike:

Cibolo Tumpike L.P.

25 Highland Park Village #100-758

Dallas, Texas 75205

Attn: John N. Crew, Manager

Either City or Cibolo Turnpike may from time to time by written notice given to the other pursuant to the terms of this <u>Section 12.7</u> change the address or designees to which notices shall be sent or designate one or more additional Persons to whom notices are to be sent.

Section 12.8 Governing Law. This Agreement and any matter relating to this Agreement, including any matter in contract or tort or in equity or at law, shall be governed by the laws of the State of Texas without regard to principles of conflicts of law that direct the application of the laws of a different state. If the parties do not agree to arbitration with respect to a particular claim or dispute in accordance with the terms of this Agreement, the parties agree that any legal action shall be brought in a state or federal court of competent jurisdiction in Guadalupe County, Texas, and the parties agree to establish venue in such county. The parties further agree that any such lawsuit that may be brought shall be tried by the court, without a jury.



- Section 12.9 <u>Effective Date</u>. This Agreement shall be a legally binding agreement, in full force and effect, as of the date set forth in the first paragraph of this Agreement.
- Section 12.10 <u>Further Assurances</u>. City and Cibolo Turnpike shall execute, acknowledge and deliver, after the date hereof, without additional consideration, such further assurances, instruments and documents, and shall take such further actions, as Cibolo Turnpike or City shall reasonably request of the other in order to fulfill the intent of this Agreement and the transactions contemplated hereby.
- Section 12.11 <u>Third-Party Beneficiary</u>. The provisions of this Agreement are for the exclusive benefit of City and Cibolo Turnpike and not for the benefit of any third person, nor shall this Agreement be deemed to have conferred any rights, express or implied, upon any third person unless otherwise expressly provided for herein.
- Section 12.12 <u>Counterparts</u>. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.
- Section 12.13 <u>Prior Agreements Superseded.</u> This Agreement supersedes any prior understanding or written or oral agreements between City or Cibolo Turnpike respecting the within subject matter, and contains the entire understanding between the parties with respect thereto. There are no oral agreements between City and Cibolo Turnpike.
- Section 12.14 <u>Non-Exclusive Remedies</u>. Except as otherwise provided herein, no remedy herein conferred or reserved is intended to be exclusive of any other available remedy or remedies, and each and every such remedy shall be cumulative and shall be in addition to every such remedy given under this Agreement or now or hereafter existing at law or in equity or by statute. It is expressly agreed that the remedy at law for breach by a party of its obligations hereunder may be inadequate in view of the complexities and uncertainties in measuring the actual damages which would be sustained by reason of either party's failure to comply fully with each of such obligations. Accordingly, the obligations of each party hereunder are expressly made enforceable by specific performance, except as otherwise specifically provided herein.
- Section 12.15 <u>Language</u>. The language used in this Agreement shall be deemed to be the language chosen by the parties hereto to express their mutual intent, and no rule of strict construction shall be applied against any party.
- Section 12.16 <u>Computing Time, Saturday, Sunday or Holiday</u>. The day of an act, event, or default after which a designated period begins to run is not included when computing a period prescribed or allowed in this Agreement. The last day of the period is included, but if that day is a Saturday, Sunday or legal holiday, the period extends to the end of the next day that is not a Saturday, Sunday or legal holiday.
- Section 12.17 <u>Lawsuits</u>. To the extent permitted by law, City agrees to cooperate with and assist Cibolo Turnpike in connection with initiating or defending any actions, including mediation, arbitration, or state or federal administrative or court proceedings, against or brought by third parties that threaten to stop, delay or increase the cost of (a) completion of the Project, (b) the imposition or collection of any revenue necessary for the funding of the Project, (c) the

TTC Draft: 02/24/2017

remediation, if necessary, of the Project Site, and (d) the negotiation, execution, or implementation of this Agreement or any other agreement between City and Cibolo Turnpike or otherwise related to the Project, including the enforcement of any indemnity provisions. Cibolo Turnpike shall reimburse the City for all costs and expenses, the City actually incurs in providing assistance to Cibolo Turnpike in the initiation or defense of any action pursuant to this section, including, but not limited to, the City's actual attorney's fees.

Section 12.18 Attorneys' Fees. In the event of any controversy, claim or dispute between City or Cibolo Turnpike arising from or relating to this Agreement (whether in litigation or arbitration, and including the enforcement of any indemnity provisions), the prevailing party shall be entitled to recover reasonable costs, expenses and attorneys' fees. For all purposes of this Agreement and any other documents relating to the Agreement, the terms "attorneys' fees" or "counsel fees" shall be deemed to include paralegals' and legal assistants' fees, and wherever provision is made herein or therein for the payment of attorneys' or counsel fees or expenses, such provision shall include such fees and expenses (and any applicable sales taxes thereon) incurred in any and all judicial, bankruptcy, reorganization, administrative or other proceedings, including appellate proceedings, whether such fees or expenses arise before proceedings are commenced or after entry of a final judgment.

Section 12.19 <u>Assignment</u>. Any assignment by either party must have the written consent of the other, such consent not to be unreasonably withheld, delayed or conditioned; but excluding any assignment by the City to an instrumentality created by the City created at any time such assignment not requiring the consent of Cibolo Turnpike. In the event that the City makes such assignment to an instrumentality, City shall notify Cibolo Turnpike of such assignment. Any purported assignment in violation of this <u>Section 12.19</u> shall be void. This section shall not limit the ability of Cibolo Turnpike to contract with any third party, including its own affiliates, to provide services to or in support of the Project.

Section 12.20 <u>Time of the Essence</u>. Subject to the terms hereof, time is of the essence with respect to the performance of each of the covenants and obligations contained in this Agreement.

Section 12.21 Mediation.

- (a) Any claim, dispute, or other matter in question arising out of or related to the Agreement shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.
- (b) City and Cibolo Turnpike shall endeavor to resolve claims, disputes and other matters in question between them by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association then currently in effect. Request for mediation shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of thirty (30) days from the date of filing unless stayed for a longer period by agreement of the parties or court order.



(c) City or Cibolo Turnpike agree to split the mediator's fee and any filing fees equally. The mediation shall be held in Guadalupe County, Texas, unless another location is mutually agreed upon. Written agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

Section 12.22 <u>Dispute Resolution</u>. Any claim, dispute or other matter in question arising out of or related to this Agreement or otherwise arising from the design, construction and operation of the Project, shall first be subject to mediation in accordance with the provisions of <u>Section 12.22</u>. Claims, disputes and other matters in question between the parties may be decided by arbitration, but only if both Cibolo Turnpike and City so agree at the time. Any such arbitration shall be conducted in accordance with the provisions of Section 12.23.

Section 12.23 Arbitration.

- (a) If the parties agree as provided in <u>Section 12.22</u>, any claim, dispute or other matter in question arising out of or related to this Agreement or otherwise arising from the design and construction of the Project shall be subject to arbitration.
- (b) The arbitration shall be in accordance with the Federal Arbitration Act and the Construction Industry Arbitration Rules currently in effect and as modified herein. Demand for arbitration shall be filed in writing by both parties to this Agreement with the American Arbitration Association.
- (c) A request for arbitration shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall a request for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute, or other matter in question would be barred by the applicable statute of limitations.
- (d) An arbitration arising out of or related to the Agreement may be consolidated with an arbitration with the parties or entities involved in the design, development, and construction of the Project if such arbitration involves common issues of fact relating to the parties' obligations under this Agreement.
- (e) All statements submitted by the parties to the arbitrator(s) which include any monetary claim, counterclaim or cross-claim must state the monetary amount being sought. In the event that the monetary amount is unliquidated or has not been fully determined, the statement seeking such recovery shall state, in good faith, the minimum amount of such monetary claim, exclusive of interest and attorneys' fees.
- (f) All arbitrations involving monetary claims in excess of two hundred fifty thousand dollars (\$250,000), exclusive of interest and attorneys' fees, shall be decided by an arbitration panel consisting of three (3) persons.
- (g) The arbitrator (or panel of arbitrators, if applicable) shall establish reasonable procedures and requirements for the production of relevant documents and require the exchange of information concerning witnesses to be called. For arbitrations involving monetary claims in excess of fifty thousand dollars (\$50,000): (1) the parties shall be entitled to discover all documents and information reasonably necessary for a full understanding of any legitimate issue raised in the arbitration and (2) the parties may use all methods of discovery available under the Federal Rules of Civil Procedure, as modified by the Local Court Rules of the United States District Court for the Northern District of Texas, and shall be governed thereby. Prior to



the deposition of any expert witness, the party proposing to call such a witness shall provide a full and complete report by the expert, together with the expert's calculations and other data by which the expert reached any opinions concerning the subject matter of the arbitration. The report shall be provided no less than ten (10) days prior to the date set for the expert witness' deposition. Any disputes arising from such discovery shall be decided by the arbitrator (or panel) and such decision or action taken by the arbitrator (or panel) shall be final as in all factual matters.

- (h) There shall be a prehearing meeting between City and Cibolo Turnpike at which each party shall present a memorandum disclosing the factual basis of its claim and defenses and disclosing legal issues raised. The memorandum shall also disclose the names of any expert a party shall present as a witness during the proceedings. At the prehearing meeting, the arbitrator (or panel) shall make and set schedules for hearings consistent with the powers as set forth herein.
- (i) If the arbitrator (or panel) finds, after affording an opportunity to be heard, that City or Cibolo Turnpike has abused the discovery process or has failed to act in good faith with regard to discovery or these arbitration rules, the arbitrator (or panel) shall have, in addition to any other powers conferred by law or the Construction Industry Arbitration Rules, those powers conferred upon trial courts by the Federal Rules of Civil Procedure, subject to the same conditions and limitations set forth therein.
- (j) The Federal Rules of Evidence shall be applied by the arbitrator (or panel) but liberally construed to allow for the admission of evidence that is helpful in resolving the controversy. Rulings on the admission of evidence made by the arbitrator (or panel) at the hearing shall be final and not subject to any appeal. At the time of the award, the arbitrator (or panel) shall prepare and provide to the parties findings of fact and conclusions of law supporting the award. When such findings of fact and conclusions of law are provided, the findings of fact shall be final.
- (k) The award of the arbitrator (or panel) shall be final except that either City or Cibolo Turnpike may request judicial review of the award for errors of law (other than errors relating to discovery disputes and admissibility of evidence). Such review must be filed in a court in Guadalupe County, Texas, having jurisdiction thereof no later than thirty (30) days after the party seeking review receives or is deemed to have received notice of the award. When such action for judicial review has been timely and properly filed, no other action for enforcement of the award shall be initiated or shall proceed until a final judgment has been rendered in the proceeding for review of the award for errors of law.

Section 12.24 <u>Injunctive Relief</u>. Notwithstanding the foregoing, the provisions of <u>Sections 12.20, 12.22</u> or <u>12.23</u> shall not apply to an action for injunctive relief or a writ of mandamus filed in connection with this Agreement.

Section 12.25 Confidentiality; Open Records Act.

- (a) Each party to this Agreement agrees to keep confidential and not use, reveal, provide or transfer to any third party any Confidential Information (as defined below) it obtains or has obtained concerning the other party to this Agreement or the Project, except as follows:
- (i) subject to <u>Section 12.25(ii)</u>, to the extent that disclosure to a third party is required by applicable law or regulation;
- (ii) information which, at the time of disclosure, is generally available to the public (other than as a result of a breach of this Agreement or any other confidentiality agreement to which a party to this Agreement is a party or of which it has knowledge), as evidenced by generally available documents or publications;
- (iii) information that was in its possession prior to disclosure (as evidenced by appropriate written materials) and was not acquired directly or indirectly from any other party to this Agreement;
- (iv) to the extent disclosure is necessary or advisable, to its employees, consultants or advisors, or to its affiliates or their employees, consultants or advisors, in each case solely for the purpose of carrying out their duties under this Agreement;
- (v) to banks or other financial institutions or agencies or any independent accountants or legal counsel or investment advisors employed in connection with the Project, or by any party to this Agreement, to the extent disclosure is necessary or advisable to obtain financing, including, without limitation, the Project financing and the raising of the Development Capital by Cibolo Turnpike;
- (vi) to investors in connection with the Project financing and raising the Development Capital;
- (vii) to potential purchasers of a party to this Agreement or any affiliate of a party to this Agreement that directly or indirectly owns an equity interest in such party to this Agreement;
- (viii) to the extent necessary, disclosure to third parties to enforce this Agreement;
 - (ix) to another party to this Agreement; or
- (x) to parties that have signed or agreed to be bound by this confidentiality provision; provided, however, that in each case of disclosure pursuant to (iv), (vi), (vii) or (ix), the persons or entities to whom disclosure is made agree to be bound by this confidentiality provision. The obligation of each party not to disclose Confidential Information except as provided herein shall not be affected by the termination of this Agreement. As used in this Section, the term "Confidential Information" shall mean information concerning this Agreement and the properties, operations, business, trade secrets, technical know-how and other non-public information and data of or relating to the parties to this Agreement or the Project.

The restrictions on disclosure of Confidential Information set forth above shall lapse two (2) years from the date of the termination of the Project. In the event a party



withdraws from the Project, such party shall remain subject to the restrictions on disclosure of Confidential Information for two (2) years from the date of such party's withdrawal.

If any Person requests City to disclose any Confidential Information under the Texas Open Records Act (Tex. Gov't Code Ann. § 552.001 et seq.) or equivalent or successor statute (the "Open Records Act"), prior to making such disclosure, City shall notify Cibolo Turnpike of such request, in which case Cibolo Turnpike shall promptly and timely inform City whether any of the requested materials constitute confidential, proprietary, commercial, financial or trade secret information of Cibolo Turnpike which may be exempted from disclosure under the Open Records Act, and, in that event, City and Cibolo Turnpike shall cooperate with each other in preparing appropriate responses or filings to the Attorney General of the State and to any Person making such request, including any appeals involved therein, to prevent a disclosure of such information. In such event, each party shall further cooperate with the other to promptly identify any possible third party whose privacy or property interests may be implicated by any such request to disclose information in order to enable Cibolo Turnpike to timely furnish to any such third party any statutory notice required by the Open Records Act and seek any applicable exemptions from disclosure under the Open Records Act. So long as Cibolo Turnpike is pursuing the actions described above in a timely manner, City shall protect confidential, proprietary or trade secret information of Cibolo Turnpike as to which Cibolo Turnpike requests City to do so, unless otherwise compelled by court order, or by opinion of the Texas Attorney General. All reasonable and necessary costs associated with City's cooperation with Cibolo Turnpike hereunder in connection with any proceedings shall be borne by Cibolo Turnpike, and City shall be fully reimbursed for any of such costs it has reasonably incurred including reasonable attorneys' fees.

Section 12.26 <u>No Recourse to Cibolo Turnpike</u>. The obligations of Cibolo Turnpike under this Agreement are recourse solely to the interest of Cibolo Turnpike in the Project. No recourse or liability shall be had against any director, officer, employee, agent, member shareholder or partner of Cibolo Turnpike or of Texas Turnpike Corporation or their respective affiliates.

Section 12.27 Waiver of DTPA. CITY AND CIBOLO TURNPIKE HAVE ASSESSED THEIR RESPECTIVE RIGHTS, LIABILITIES AND OBLIGATIONS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION ACT, SECTION 17.41 ET SEQ., BUSINESS & COMMERCE CODE (THE "DTPA"). THE PARTIES AGREE THAT THE DTPA DOES NOT APPLY TO EITHER CITY OR CIBOLO TURNPIKE BECAUSE NEITHER QUALIFY AS A "CONSUMER" UNDER SECTION 17.45(4) OF THE DTPA. BUT IN THE EVENT THE DTPA IS DEEMED TO BE APPLICABLE BY A COURT OF COMPETENT JURISDICTION, CITY AND CIBOLO TURNPIKE HEREBY WAIVE THEIR RIGHTS UNDER THE DTPA, A LAW THAT GIVES CONSUMER SPECIAL RIGHTS AND PROTECTIONS. AFTER CONSULTATION WITH ATTORNEYS OF THEIR OWN SELECTION, CITY AND CIBOLO TURNPIKE CONSENT TO THIS WAIVER. THE PARTIES AGREE THAT THIS SECTION 12.27 CONSTITUTES A CONSPICUOUS LEGEND.





IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their proper officers respectively, being thereunto duly authorized, and their respective seals to be hereto affixed, as of the day and year first above written.

City of Cibolo:			
Ву:	Allen	Dunn r, City of Cibolo	
Cibolo	Turn	pike:	
On belt partner		CIBOLO TURNPIKE, LP, a Texas limited	
Ву:		BOLO TURNPIKE, GP, LLC, Lexas limited liability company, its General artner	
	Ву:	TEXAS TURNPIKE CORPORATION, a Texas corporation, its Sole Member and Sole Manager	
		By:	

Chief Executive Officer



EXHIBIT 1 PROJECT MAP

EXHIBIT B AMENDMENTS TO EXISTING AGREEMENT

28227752.2 B-1



FIRST AMENDED AND RESTATED DEVELOPMENT AGREEMENT

between

the City of Cibolo, Texas

and

Cibolo Turnpike L.P.

FIRST AMENDED AND RESTATED DEVELOPMENT AGREEMENT

This First Amended and Restated Development Agreement (the "Agreement") is made and entered into as of _______May 9, 2017 (the "Effective Date"), by and between the City of Cibolo, Texas ("City"), and Cibolo Turnpike L.P., a Texas limited partnership ("Cibolo Turnpike"), for the purpose of memorializing certain amendments to the Development Agreement (the "Initial Development Agreement") entered into by the City and Cibolo Turnpike by action of the City Council of the City taken on February 28, 2017.

Representatives of the City, the Texas Department of Transportation ("TxDOT"), and Cibolo Turnpike, by and among themselves, have engaged in meaningful discussions identifying both a transportation improvement and a significant economic development project that, consistent with the scope of the City's Thoroughfare Plan and Land Use Plan, would benefit the City and the area around the proposed Project (as detailed below). The parties to the Agreement believe that the Project offers a number of diverse, ongoing opportunities to maximize the economic benefits and opportunities for public and private entities within the City derived from a limited-access high speed tolled highway. These benefits realized throughout the City include: (1) an alternative separated grade crossing over the Union Pacific Railroad and FM 78; (2) a bridged crossing over the frequently prone-to-flooding Cibolo Creek watershed; (3) additional high speed northwest-southeast highway capacity; (4) development opportunities along the proposed Project; (5) development, maintenance and diversification of the economy of the State; (6) fostering the growth of enterprises based in the San Antonio metropolitan area and; (7) development and expansion of transportation and commerce within the State.

On February 28, 2017, the City Council of the City authorized the City's entering into and execution of the initial Initial Development Agreement between the City and the Cibolo Turnpike. This Agreement, which is an amendment and restatement of the original Initial Development Agreement, is now entered into between executed by such parties to clarify certain aspects of the hereinafter-defined and described Project that is the subject hereof and to eliminate reference to any Project component located in the City of Schertz, Texas. Upon execution of both parties hereto On the Effective Date, this Agreement replaces and supersedes in all manner and respect the initial Initial Development Agreement.

PROJECT OVERVIEW

The Project that is the subject of this Agreement is comprised of three interrelated components: (1) the "Cibolo Parkway" (as further described and defined in Section 3.1(a) hereof), which is generally the design, build, finance, operation and maintenance of a new tollroad facility extending approximately 7 miles from the intersection of Weil Road and FM 1103 southeast to IH 10 and 10, (2) the "Cibolo Expressway" (as further described and defined in Section 3.1(b) hereof), which generally consists of three "flyover" lanes on FM 1103 over Orth Lane, Green Valley Road, and near or around Saddle Spoke Road/Gatewood Bay, being three cross streets within the City and that intersect FM 1103, which "flyover" lanes are in addition to the improvements to the approximately 2.8 mile corridor of FM 1103 (from the City's

corporate limits near the intersection of FM 1103 and Chelsea/Old Wiederstein Road to the intersection of FM 1103 and Rodeo Way) to be constructed by TxDOT (such TxDOT-constructed improvements, as further described and defined herein, the "FM 1103 Improvements"). The and (3) maintenance and operation of the foregoing by Cibolo Turnpike. Accordingly the term "Project" means the (1) design, build and finance of the Cibolo Expressway and the Cibolo Parkway and (2) operation and maintenance of the FM 1103 Improvements that are "turned back" to the City (such portion of the FM 1103 Improvements herein referred to as the "Turnback FM 1103"), the Cibolo Expressway, and the Cibolo Parkway. Each Project component, as more fully described herein, is shown on the Project map attached hereto and incorporated by reference as Exhibit 1; conceptual depictions of the Cibolo Expressway are shown in Exhibit 2 and are also incorporated herein by reference.

Tollroad Toll Road Feasibility Process

The City formed a Blue-Ribbon Committee comprised of diverse community members to consider the idea / concept of a tollroad toll road within the community and to be part of the City's thoroughfare plan. The Blue-Ribbon Committee fully endorsed the tollroad toll road concept and recommended that the City further advance the tollroad toll road.

The City with Cibolo Turnpike's assistance performed a Feasibility Study to analyze the viability of a possible tollroad facility in the City. The Feasibility Study considered the projected traffic and revenue and estimated project costs. In addition, as part of the study process a series of City Public Hearingspublic hearings were held to gather citizen input about this possible Project. The City reviewed and accepted the Feasibility Study, and voted to move forward with the process to develop the Project.

Cibolo Expressway (FM 1103 – Improvements)

TxDOT, in addition to planned improvements to other sections of FM 1103, is currently planning improvements on FM 1103 from the City's corporate limits near the intersection of FM 1103 and Chelsea/Old Wiederstein Road to Rodeo Way Drive. The proposed TxDOT improvements are to widen the existing two-lane facility to four-lanes, including raised medians and left turn lanes, two 5' bike lanes, curbs and gutters, underground storm sewer system, and 6' sidewalks along both sides of the roadway (collectively referred to as the "FM 1103 Improvements"). __The existing FM 1103 right-of-way ("ROW") is 80 feet wide, and the proposed ROW is 120 feet. TxDOT will acquire the additional ROW. The City will request TxDOT that the design for the FM 1103 Improvements along that stretch of FM 1103 hereafter defined as the Turnback FM 1103 accommodate the addition of the Cibolo Expressway.

Under TxDOT's "Turnback Program" the City will request that upon TxDOT's completion of the FM 1103 Improvements that TxDOT transfer to it (or an instrumentality thereof) ownership of FM 1103 from the City's corporate limits near the intersection of FM 1103 and Chelsea/Old Wiederstein Road to Weil Road including the FM 1103").

Cibolo Turnpike proposes to addconstruct the "Cibolo Expressway" to the as improvements to the Turnback FM 1103 in addition to the TxDOT-constructed FM 1103

Improvements- to such section of FM 1103. The Cibolo Expressway will be funded solely by Cibolo Turnpike; and, as provided herein (and to the extent practicable), the construction of the Cibolo Expressway shall be coordinated with TxDOT so that its construction shall occur simultaneously with the construction of the proposed TxDOT-improvements-constructed FM 1103 Improvements in order to minimize traffic disruption on FM 1103.

Cibolo Parkway

Cibolo Parkway is the proposed new tollroad facility from the intersection of Weil Road and FM 1103 to the Zuehl Road Exit on I-10 approximately 7 miles long. Cibolo Turnpike, on the City's behalf, will develop Cibolo Parkway that will include the design (with a concrete surface in accordance with TxDOT standards for roads having similar size and scope), environmental studies, right-of-way acquisition, construction, maintenance, and operation.

Project Development Process

Cibolo Turnpike will develop the Project in two phases, with Phase I being development of a Pro Forma Model to verify the financial viability of the Project, and Phase II being the detail design, ROW acquisition, and construction of the Project. As the Project develops, the parties retain the ability to add additional components to provide drivers with an improved transportation experience and improved access to destinations.

RECITALS

- A. Essential transportation improvements in and around the City are required to satisfy the accelerated growth being experienced there. Financial assistance from the State is not currently available for all of the City's approved and critical projects; therefore, the City has resourced another alternative to help provide the funding it needs.
- B. Extensive, prime economic development opportunities exist in an area of the City bound by the FM 78 on the west and IH-10 on the east. These opportunities include commercial and residential growth along both of these major transportation corridors, as well as new improvements to the City's infrastructure that will implement and manage planned growth for this undeveloped area of the City.
- C. The City has determined that it would be in its best interests, in fulfilling its public purpose and legislative mandate, to develop a limited-access high speed tolled highway to satisfy economic and population growth issues as well as to provide an alternate southeast/northwest route separated grade crossing over the Union Pacific Railroad and FM 78, between IH-35 and IH-10.
- D. The City wishes to further define the feasibility of the Project, and thus Cibolo Turnpike will undertake studies, including the Pro Forma Model, to determine whether the Project appears to be feasible (financially and otherwise), and to determine whether surplus revenues under the Operating Agreement (as hereinafter defined) can be expected to support a significant portion, if not all, of the Project's projected construction, operation and maintenance, and finance costs.

E. As evidence of the City's desire to advance the Project, and in furtherance of the Blue-Ribbon Committee's recommendations the City will do the following: execute this Agreement; petition the Alamo Area Metropolitan Planning Organization (the "AAMPO") for the adoption of the Project and formally place the Project on the funded portion of the AAMPO's Metropolitan Transportation Plan; and request that TxDOT enter into a Memorandum of Understanding with Cibolo Turnpike for the development of the Project.

NOW, THEREFORE, in consideration of the premises, covenants, agreements and obligations contained herein, the parties do hereby agree as follows:

ARTICLE I

SUBJECT OF AGREEMENT

A. Purpose of This Agreement

The purpose of this Agreement is for the development, finance, operation, management, and maintenance of the Project by Cibolo Turnpike. This Agreement defines the development of the Project, and an Operating Agreement defines the Project operating terms all as mutually agreed upon by the Parties.

B. Parties to This Agreement

The City is a home rule municipality, exercising governmental functions and powers as a home rule city in the State of Texas. The "City," as used in this Agreement includes the City of Cibolo, Texas, and any assignee of, instrumentality of, or successor to its rights, powers, and responsibilities.

Cibolo Turnpike, LP, is a Texas limited partnership and Cibolo Turnpike, GP, LLC, a Texas limited liability company, is its sole general partner created for the development and operation of the Project.

ARTICLE II

TERM AND CANCELLATION

Section 2.1

- (a) This Agreement shall be for a term of fifty (50) years, plus additional time, as needed to conform with the Financial Model, beginning on the Effective Date as defined hereineffective date of the Initial Development Agreement (the "Term"). The Operating Agreement as part of this program will run co-terminus with the Development Agreement.
- (b) The City hereby authorizes, permits and grants a non-exclusive right to Cibolo Turnpike, and to all agents, representatives, consultants, employees, and invitees of Cibolo Turnpike, easement, right-of-way, ingress, egress, access, and use rights in, over, upon, across and along all ingress, egress and access portions of all streets adjacent to the Project belonging to

the City, to Cibolo Turnpike's for the development and operation of the Project and/or otherwise as provided for in this Agreement. Any temporary road closures and / or temporary detours will be coordinated with the City.

ARTICLE III

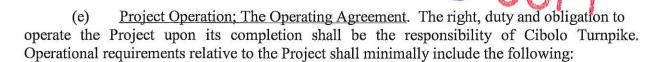
GENERAL CONTRACT PROVISIONS

Section 3.1 General Contract Provisions. Notwithstanding anything in this Agreement to the contrary, to the extent applicable, any and every contract Cibolo Turnpike may negotiate or execute under the authority of this Agreement, either on behalf of itself, behalf of the City, or both itself and the City shall be subject to terms and conditions of this Section 3.1, which are as follows:

- (a) Cibolo Parkway:
 - (i) Land Acquistion.
 - A. Costs: At its sole cost and expense, Cibolo Turnpike shall acquire in the name of the City (or an instrumentality thereof) all necessary ROW for the Cibolo Parkway.
 - B. Land Acquisition Process. Cibolo Turnpike shall negotiate Cibolo Parkway facility land acquisition transactions on a fair-market price basis, as determined by independent appraisals; and, the City's institution of eminent domain shall only be used as a last resort for the acquisition of any new ROW. All-land acquisitions shall also be subject to the following: In the event that eminent domain is determined to be necessary, Cibolo Turnpike shall reimburse the City for any and all costs the City incurs in undertaking the eminent domain action.
 - 1. In the event that eminent domain is determined to be necessary, Cibolo Turnpike shall reimburse the City for any and all costs the City incurs in undertaking the eminent domain action.
 - (ii) Development of the Cibolo Parkway shall be subject to the following:
 - A. Route. As this is a community driven project, the City shall have the final determination as to the Cibolo Parkway route, so that the route complies with the City's Thoroughfare Plan and Future Land Use Plan and considers projected future development.
 - B. Construction Standards. Cibolo Turnpike will develop the Cibolo Parkway using TxDOT standards for roads of similar size and scope to ensure a quality design.
 - C. The Cibolo Parkway road surface shall be concrete and the road construction shall comply with the requirements of any City ordinance regulating road and street construction.

(b) Cibolo Expressway:

- (i) Development of Cibolo Expressway. TxDOT is currently planning improvements on FM 1103 from the City's corporate limits near the intersection of FM 1103 and Chelsea/Old Wiederstein Road to Rodeo Way Drive. The proposed TxDOT improvements are to widen the existing two-lane facility to four-lanes, including raised medians and left turn lanes, two 5' bike lanes, curbs and gutters, underground storm sewer system, and 6' sidewalks along both sides of the roadway. (the "FM 1103 Improvements") __The existing FM 1103 right- of- way ("ROW") is 80 feet wide, and the proposed ROW is 120 feet. TxDOT will acquire this additional ROW. The City will request TxDOT that the design for the FM 1103 Improvements along that stretch of FM 1103 herein defined as the Turnback FM 1103 accommodate for the addition of the Cibolo Expressway; and that TxDOT coordinate (to the extent practicable) the construction of the Cibolo Expressway with the construction of the FM 1103 Improvements in order to minimize traffic disruption on FM 1103.
- (ii) Land Acquisition. In the event that additional ROW is needed for the Cibolo Expressway project, beyond the additional ROW that TxDOT acquired as part of the FM 1103 Improvements, Cibolo Turnpike shall acquire the ROW following all City, State, and Federal rules and procedures. Any ROW acquired shall be consistent with the provisions of Section 4.8.
- (c) <u>Financing</u>. The Project shall be financed solely by Cibolo Turnpike from private capital and investment. Further, in no event shall the following ever occur:
 - (i) a. Creation of a public improvement district to fund any aspect of the toll lanes of Cibolo Expressway and Cibolo Parkway; or
 - (ii) b. The use of dedicated Local, State or Federal tax dollars to fund any aspect of the toll lanes of Cibolo Expressway and Cibolo Parkway; or
 - (iii) e. The use of public grants or direct governmental loans, such as Transportation Infrastructure Finance or Innovation Act loans, to fund any aspect of the toll lanes of Cibolo Expressway and Cibolo Parkway.
- (d) <u>Transfer of Title</u>. Upon completion of the Project, right of title and possession to the real property and the improvements shall be transferred to the City (or an instrumentality thereof), except for those rights of operation transferred to Cibolo Turnpike pursuant to the Operating Agreement, unencumbered by any liens or restrictions against its use as a public right-of-way, (including the right to place public utilities in such rights-of-way).



- (i) That the term of the Operating Agreement shall run co-terminus with this Agreement.
- (ii) That tolls for vehicles traveling on the tolled portions of the Project shall be subject to the provisions of Section 9.2(iiic).
- (iii) That the following vehicles shall not be subject to any toll for travel on the Project: official City of Cibolo vehicles, official City of Schertz vehicles, official Schertz-Cibolo-Universal City Independent School District vehicles, and official Guadalupe County Sheriff's Office vehicles, vehicles being used by an entity to provide emergency services to the City-of Cibolo under contract; or such other vehicles exempted by state law from the payment of tolls;
- (iv) That Cibolo Turnpike shall advise the City of the initial and future toll rates at least 90 days before implementation;
- (v) That the standards for Project operation shall, minimally, adhere to TxDOT's operational protocol for projects of similar size, scope and traffic count;
- (vi) That the City shall be entitled to provide to Cibolo Turnpike input regarding Project operation, which input shall be taken into consideration and, to the extent commercially and practically reasonable (within the financing structure to which the Project is at such time subject), implemented;
- (vii) That the payment of operations and maintenance costs shall have a first priority position in the event of the operator's default or bankruptcy;
- (viii) That Cibolo Turnpike shall maintain a customer service office within the <u>City's</u> corporate limits of the <u>City of Cibolo</u> for the purpose of resolving claims of erroneous toll charges and related matters;
 - (ix) Requirement that operator-to maintain adequate liability insurance; and
- (x) A "buyback" provision, which shall state the terms and conditions by which the City may buy Cibolo Turnpike's interest in the Operating Agreement at a future date.
- (f) Negotiation of Operating Agreement. Prior to Financial Close (as defined herein), the City and Cibolo Turnpike shall negotiate the terms of a stand-alone "operating agreement" regarding the Project's operation that, minimally, encompasses a through g of this Section 3.1(e),3.1, which operating agreement shall be presented to City Council for consideration; provided, however, that the failure of the City and Cibolo Turnpike to enter into a separate operating agreement shall not invalidate Cibolo Turnpike's right, duty and obligation to operate



the Project as specified hereunder; provided further, however, that any operation of the Project by Cibolo Turnpike shall be subject to the minimum operational requirements specified in a through g. of this Section 3.1(e).3.1. For purposes of this Agreement, the term "Operating Agreement" shall mean any agreement pursuant to which Cibolo Turnpike operates the Project, whether by separate agreement or pursuant to the provisions of this Section 3.1(e) and other applicable provisions of this Agreement.

- (g) Non-Compete Language Prohibited. Cibolo Turnpike shall never require the City to enter into any "non-compete" agreement; and no contract authorized under this Agreement or the Operating Agreement shall ever negate or diminish the City Council's authority to plan, fund and construct future streets, roads, highways, mass transit, or other such improvements as City Council may, in its sole discretion, find necessary to address the transportation needs of the City and its citizens. Further, should such a "non-compete" provision be incorporated in any contract or agreement authorized by this Agreement, it shall be void ab initio.
- (h) Other Governmental Approvals. The obligations of the Parties shall be subject to the ability to obtain any necessary approvals from other governmental entities that are required for completion and operation of the Project.

ARTICLE IV

PROJECT DEVELOPMENT

Section 4.1 Project Development - Phase I.

- (a) <u>Pro Forma Model</u>. During Phase I of Project Development, Cibolo Turnpike shall cause to be prepared a Pro Forma Model for the Project. Cibolo Turnpike will use the Pro Forma Model to determine the financial viability of the Project. The Pro Forma Model analysis will include the preliminary determination of various risk factors as they relate to development of the Project, such as environmental, design, cost and traffic and revenue issues.
- (b) <u>Term of Phase I.</u> Cibolo Turnpike shall begin Phase I upon the execution of this Agreement, and will diligently work on the Pro Forma Model. Upon the completion of the Pro Forma Model analysis, Cibolo Turnpike will present the results to the City, which shall include Cibolo Turnpike's proposed plan for Project Development Phase II. Phase I is anticipated to take approximately 10-12 months to complete.

Section 4.2 <u>Project Development - Phase II.</u>

(a) <u>Project Development</u>. Phase II is the development of the Project including the detail design, ROW acquisition, bidding, and construction. <u>Including developing</u>, and <u>development of</u> the Financial Model (as detailed below in Section 4.2(c)), and securing the funding as required for the development of the Project. Cibolo Turnpike shall comport with the requirements Texas Local Gov. Code Chapter 212, Subchapter C. ("**Developer Participation in Contract for Public Improvements**") with respect to the development of the Project

- (b) Term of Phase II. Phase II the development of the Project will begin after Cibolo Turnpike completes Phase I Pro Forma and determines that the Project is financially viable. Commencement of Project construction shall not begin until Project funding) has occurred (as detailed below in Section 4.3. 4.3). Phase II will be complete upon the completion and acceptance of the construction of the Project. Notwithstanding the foregoing, this Agreement shall terminate if Financial Closing (as hereafter defined) does not occur within two years following commencement of Phase II.
- (c) Financial Model. Financial Model means the computerized financial model including projections and assumptions for operation of the Project showing, among other things: (a) costs for the operation and maintenance of the Project, including management payments to Cibolo Turnpike for its operation of the Project; (b) debt service costs for debt incurred by Cibolo Turnpike related to the Project; (c) reserves for operations and for capital improvements or such other reserves as may be required by sound engineering practice; (d) payments to Cibolo Turnpike as a return on equity invested by its partners, based on the Base Case Equity IRR, as defined and set forth in the Financial Model; and (e) payments to the City and Cibolo Turnpike as a split of all remaining revenues from the operation of the Project, based on the percentages as set forth in the Financial Model.
- (d) <u>Construction Contract</u>. Cibolo Turnpike shall advertise for construction bids, issue bid proposals, receive and tabulate the bids, and award and administer the contract or contracts for construction of the Project (the "Construction Contract"). Administration of the Construction Contract shall include the responsibility for construction engineering, material acceptance testing, and construction quality acceptance, and for issuance of any change orders, supplemental agreements, amendments, or additional work orders that may become necessary after the award of the Construction Contract. The bidding process is to be competitive and comply with all applicable federal and <u>stateState</u> laws. Copies of the Construction Contract shall be provided to the City, including any bond or insurance requirement as detailed herein.

(e) <u>Insurance and Bonding Requirements</u>

- (i) <u>Performance Bonds</u>. Cibolo Turnpike will provide Performance Bonds to ensure completion of the Project. In addition, included within any successful bidder's Construction Contract, the successful bidder shall include a Performance Bond to ensure completion of the Project.
- (ii) <u>Insurance Requirement</u>. Cibolo Turnpike will provide the appropriate construction and management insurance package for the development of the Project (the "**Insurance Coverage**"). In addition, included within any successful bidder's Construction Contract will be the applicable Insurance Coverage consistent with the City coverages and as stated in Section 4.2(d) above.
- (f) <u>Development Standards / TxDOT Coordination.</u> As part of the development of the Project, Cibolo Turnpike will develop the Project using TxDOT standards (for road projects of similar size and scope) to ensure a quality design. In addition, Cibolo Turnpike will continually coordinate with TxDOT with all aspects of the Project including environmental coordination / approvals, and design approvals. Cibolo Turnpike will follow TxDOT's

guidelines for 'local let' projects. The Project is planned to have a concrete pavement surface as previously described. Cibolo Turnpike will consult with TxDOT and the City regarding pavement design.

- (g) <u>Construction Management Services</u>. During the construction of the Project, Cibolo Turnpike shall manage the progress of construction through final completion of the Project. Cibolo Turnpike shall monitor the timing of commencement, progress and completion of Project construction by the contractor in accordance with the terms of the design, bid documents, environmental compliance issues, and the Construction Contract, and shall coordinate with the City and TxDOT as necessary or advisable to ensure compliance with any applicable State and federal requirements.
- (h) <u>Project Communication</u>. During the construction of the Project, Cibolo Turnpike shall periodically, and no event less than once every three months, report the Project progress to the City Council. The first report shall provide City Council with an estimated timeline for completing each phase of the Project, the estimated Project costs, and any anticipated issues that may delay completion of the Project. Thereafter, Cibolo Turnpike shall update the City Council on construction progress and Project costs incurred during the preceding quarter.
- (i) <u>Project Completion</u>. When the Project is complete, Cibolo Turnpike shall issue and sign a ""Notification of Completion" certifying that all work has been completed in accordance with the requirements of this Agreement, all governmental approvals, and applicable laws.
- Section 4.3 <u>Development Funding</u>. Cibolo Turnpike commits to use its commercially reasonable efforts to raise sufficient capital, either debt and/or equity (the "**Development Capital**") to be used to pay substantially all of the development costs of the Project. Funds for the development of the Project shall be secured prior to the commencement of Project construction (evidence of acquisition of which financing is referred to herein as "**Financial Closing**").
- Section 4.4 Authority and Responsibility of Cibolo Turnpike During Development

 Period Regarding the Cibolo Parkway and Cibolo Expressway. The City acknowledges and
 agrees that, consistent with and subject to the provisions of Article IV, during Phase I and Phase
 II of the Project's development, Cibolo Turnpike shall be responsible for, and have the authority
 to take, all actions it deems reasonably necessary to achieve the Financial Closing and thereafter
 for any further actions reasonably necessary to pursue all or any part of any Phase II (being the
 Project's development period). As noted above, Cibolo Turnpike will develop the Project
 following Texas Local Gov. Code Chapter 212, Subchapter C. (Developer Participation in
 Contract for Public Improvements), which provides for Cibolo Turnpike managing the
 development of the Project. There may be additional actions that may be subject to the consent
 of City, which consent shall not be unreasonably withheld, may include, without limitation, the
 following:
 - (a) Managing the day-to-day business affairs of City relating to the Project.
- (b) Retaining engineers, consultants, attorneys, accountants, financial advisors and other professionals and entering into contracts with Cibolo Turnpike.

- (c) Identifying potential Project sites and negotiating for the acquisition of such Project sites.
 - (d) Commissioning and preparing all Project studies.
- (e) Selecting technology for the Project and negotiating for the acquisition or license of such technology.
- (f) Designing or supervising the design of the Project, including size, configuration, performance levels, operating parameters and related design matters.
- (g) Applying for such governmental approvals as may be required for the Project.
- (h) Preparing such bid documents as may be required for the acquisition of equipment, services and other assets necessary for the Project.
- (i) Negotiating contracts for the procurement of materials and supplies to be utilized by the Project.
- (j) Negotiating the acquisition of (or options to acquire) easements and rights of way as may be required for the Project.
 - (k) Negotiating contracts for Project utilities.
- (l) Negotiating contracts for the sale or other disposition of property determined to be surplus relative to the development of the Project.
- (m) Developing a plan of financing, preparing financing documents, preparing offering documents and doing all related work necessary to achieve Financial Closing.
 - (n) Developing a Market Standard package of insurance for the Project.
- Section 4.5 <u>Responsibility for Development Costs</u>. Cibolo Turnpike shall be responsible for the Project's development costs, including the payment of all costs incurred by Cibolo Turnpike in performing its obligations of the Agreement (which costs are subject to reimbursement from the Financial Closing).
- Section 4.6 No Liability for the Development Costs. If the Financial Closing does not occur, except as otherwise expressly set forth in the Agreement, neither the City nor Cibolo Turnpike shall have any obligation, express or implied, to reimburse the other Party for any Project development cost, but any Partyparty which breaches a material provision of this Agreement, and fails to cure such breach, shall be liable for actual damages suffered by the other Partyparty.

Section 4.7 Level of Effort; Cooperation.

(a) In developing the Project under this Agreement, Cibolo Turnpike's obligations shall be limited to commercially reasonable efforts. Nothing herein shall imply or create the inference that if Cibolo Turnpike concludes, in its sole discretion, that the Project as envisaged by the Agreement will not be economically feasible or are not capable of being completed on a commercially reasonable basis, that Cibolo Turnpike must nonetheless continue developing the Project and expending additional funds; provided that if Cibolo Turnpike reaches a conclusion that the Project as envisaged by the Agreement will not be economically feasible or are not capable of being completed on a commercially reasonable basis, Cibolo Turnpike will deliver a "Determination of Non-Feasibility" to the City, expressing this conclusion and the reasons therefor. However, if Cibolo Turnpike reaches a conclusion that the Project, as envisaged by the

Agreement, will be economically feasible and capable of being completed on a commercially reasonable basis, Cibolo Turnpike will deliver a "**Determination of Feasibility**" to the City expressing this conclusion before the date of termination, as stated in Section 4.10. Upon the City's receipt of a "Determination of Feasibility". Cibolo Turnpike shall become contractually obligated to fully complete the Project as envisaged by the Agreement.

(b) Subject to the other provisions of this Agreement, the Parties hereto shall cooperate fully with each other and their respective officers, directors, employees, agents, counsel, accountants and other designees in connection with any steps required to be taken as a part of the Project.

Section 4.8 Right of Way (ROW).

- (a) ROW Coordination. The Parties agree to coordinate with TxDOT and any other governmental authority in an effort to acquire any additional rights of way, including railroad crossing permits/approvals or sites for the Project through the use of existing or acquired road rights of way or other locations.
- (b) ROW Acquisition Process. Cibolo Turnpike will acquire the necessary ROW for the Project. The ROW acquisition process will follow all applicable State and federal rules regarding the acquisition of ROW. Cibolo Turnpike will keep the City informed throughout the ROW acquisition, including status, issues, and other items that may occur. Cibolo Turnpike goal and as directed by the City, is to acquire the ROW through a negotiated process and terms; however, only if all other means fail will the acquisition go to eminent domain.
- (c) Eminent Domain. Only, after Cibolo Turnpike's must make a good faith attempt (as established, minimally, as the basis upon which TxDOT exercises procedures dictate the ROW acuisition process prior to the exercise of the power of eminent domain in similar circumstances) to acquire the ROW, then does. Only thereafter shall the City agree to allow the use of its eminent domain authority, exercised only in accordance with the provisions of applicable Texas law, to secure remaining ROW property on behalf of the City.
- (d) ROW Title. Title of the ROW property will ultimately transfer to and be held by the City (or an instrumentality thereof). During the ROW acquisition title of the ROW may be with an another entity to facilitate the process. The identification and use of the entity will be submitted for approval of the City, which approval shall not be unreasonably withheld.

Section 4.9 Ownership of the Studies; Government Approvals.

(a) In recognition of the fact that Cibolo Turnpike may have paid for the studies, Cibolo Turnpike shall retain ownership of such studies and government approvals issued to Cibolo Turnpike during the Project's development. All other studies and government approvals obtained by or issued to Cibolo Turnpike shall remain as the property of Cibolo Turnpike and in the event of a termination of this Agreement, all studies and government approvals obtained by or issued to Cibolo Turnpike shall remain as the property of Cibolo Turnpike. Nothing in this subsection shall preclude the Parties from agreeing, on mutually acceptable terms, for the transfers the studies and government approvals to the City.

(b) Provided Cibolo Turnpike proceeds with completion of the Project, should any portion of the Project be terminated or otherwise dropped from the Project by City in accordance with the terms of this Agreement, and Cibolo Turnpike is not in breach of this Agreement or initiated a claim against the City under this Agreement, City agrees to transfer to Cibolo Turnpike, at no cost to Cibolo Turnpike, copies of all governmental approvals, studies and all other rights held by City that are related to such terminated portions of the Project, to the maximum extent permitted by law or by the terms of any such rights or governmental approval.

Section 4.10 Termination.

- (a) This Agreement shall terminate upon (i) the delivery by Cibolo Turnpike to City of a Determination of Non-Feasibility; or (ii) notice by City at any time after December 31, 2018 (unless Cibolo Turnpike shall have notified City in writing that it has reasonably determined that additional time is necessary to achieve the Initial Financial Closing, but not to exceed 180 days) if the Financial Closing Date has not yet occurred; or (iii) the City determines that that-Cibolo Turnpike failed to coordinate with TxDOT the construction of the FM 1103 Improvements and the Cibolo Expressway, as described in Section 3.1(b)(i), so that such construction of both shall be accomplished simultaneously and cause minimal traffic interruption on FM 1103.
- (b) If this Agreement is terminated pursuant to <u>Section 4.10(a)</u>, each Party shall be released from its obligations under this Agreement, other than liabilities for any breach of this Agreement.
- Section 4.11 <u>Indemnification</u>. Cibolo Turnpike shall indemnify, defend and hold harmless the City and its respective City Council members, officers, employees, representatives, attorneys and agents (the "City Indemnitees") from any losses or claims that may at any time be imposed upon, asserted against or incurred by any City Indemnitee, to the extent such losses arise out of:
- (a) The inaccuracy in any material respect of any representation or warranty of Cibolo Turnpike contained herein or the failure of Cibolo Turnpike in any material respect to comply with any of its obligations under this Agreement; or
- (b) Cibolo Turnpike's breach of a contract with a third party, or the negligent acts or omissions, or the gross negligence, or the recklessness, or the willful misconduct of Cibolo Turnpike or any of its partners, contractors, agents or affiliates in connection with the Project.
- Section 4.12 <u>Limitation on Liability</u>. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, NEITHER CIBOLO TURNPIKE NOR THE CITY, NOR ANY OF THEIR RESPECTIVE PARTNERS, OFFICERS, EMPLOYEES, MEMBERS, REPRESENTATIVES, ATTORNEYS OR AGENTS SHALL BE LIABLE TO THE OTHER, WHETHER IN CONTRACT, TORT, WARRANTY, NEGLIGENCE, STRICT LIABILITY OR OTHERWISE, FOR ANY LOSS OR PROSPECTIVE PROFITS OR ANY OTHER SPECIAL, PUNITIVE, EXEMPLARY, INDIRECT, INCIDENTAL OR CONSEQUENTIAL LOSSES OR DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR ANY FAILURE OF PERFORMANCE RELATED HERETO, HOWSOEVER CAUSED, WHETHER ARISING FROM SUCH PERSON'S SOLE, JOINT OR CONCURRENT NEGLIGENCE.



PROJECT CONTRACTS, APPROVAL RIGHTS AND AUTHORITY

- Section 5.1 Cibolo Turnpike's Authority to Negotiate Project Contracts During Development Period. To the maximum extent permitted by law, City authorizes Cibolo Turnpike to identify parties, including without limitation, Cibolo Turnpike, Texas Turnpike Corporation and other affiliates of Cibolo Turnpike, to initiate and negotiate the terms of, all Project contracts that Cibolo Turnpike reasonably determines must be negotiated or executed prior to the Financial Closing and thereafter. Cibolo Turnpike will develop the Project following Texas Local Gov. Code Chapter 212, Subchapter C. (Developer Participation in Contract for Public Improvements), which provides for Cibolo Turnpike managing the development of the Project. Cibolo Turnpike's authority under this Section includes the authority to identify parties to, and negotiate the terms of, Project contracts. Such Project contracts may include, without limitation, project design, environmental studies, traffic and revenue studies, construction management agreements, agreements with investment bankers and other agreements related to the Financial Closing. To the extent practicable and consistent with the timely achievement of the Financial Closing, Cibolo Turnpike shall consult with City's Representative (as defined below) regarding the selection of other parties to Project contracts.
- Section 5.2 <u>Project Contract Provisions</u>. Unless otherwise agreed to by City or as otherwise specifically provided in this Agreement, in connection with the negotiation of the terms of Project contracts, Cibolo Turnpike shall use commercially reasonable efforts to include the following provisions in Project contracts:
- (a) The Construction Contract as recommended by Cibolo Turnpike based upon the low bid by pre-approved qualified contractors.
- (b) The party other than City (the "Contractor") shall use labor from the Project's general area to the extent reasonably available.
- (c) The liability of City, if any, pursuant to such Construction Contract shall be limited to the <u>City's interest in Project</u> assets of the <u>Project</u>.
- (d) The Contractor shall indemnify City Indemnitees for any losses to property, or liabilities to third parties directly or indirectly resulting from the negligence or willful misconduct of the Contractor in the performance or failure to perform its obligations under such Project contract, provided that such indemnity shall not apply to any such losses or liabilities incurred by City Indemnitees by reason of City Indemnitees' gross negligence or willful misconduct.
- (e) The Contractor shall waive all indirect, incidental, consequential, special, punitive or exemplary damages it might incur.
- (f) No Project contract shall become effective until the Financial Closing, except for obligations to satisfy conditions precedent and Project contracts that, by their nature, require effectiveness before such date (e.g., investment banker engagement letter).

(g) The Contractor shall provide a performance, payment and completion bond, or shall agree to such other assurances (as, for example, a letter of credit or indemnification) as will provide reasonable assurance of performance, payment and completion.

ARTICLE VI

COMPENSATION

Section 6.1 <u>Compensation / Return.</u>

- (a) <u>Cibolo Parkway Facility</u>. If Cibolo Turnpike undertakes the Project, Cibolo Turnpike's base compensation will be as set forth in the Financial Model and City's compensation or return shall be an annual split of all remaining Surplus Revenues of the Project, based on the percentages as set forth in the Financial Model, which includes those surplus funds remaining under the indenture or other documents after providing for: (1) all operation and maintenance expenses, (2) taxes, (3) all debt service on debt incurred to finance or improve the Project, (4) all contractual commitments (5) all required reserves as set forth in the Financial Model, and (6) the necessary payments to Cibolo Turnpike to achieve a return on equity based on the Base Case Equity internal rate of return, all as further identified within the Financial Model or the Operating Agreement (as applicable).
- (b) <u>Cibolo Expressway Facility</u>. If Cibolo Turnpike undertakes the Cibolo Expressway and the Cibolo Expressway is financed as described herein, the parties' compensation or return shall be as identified within the Financial Model or the Operating Agreement (as applicable). In addition:
- (b) (i)-Cibolo Expressway Facility. If Cibolo Turnpike undertakes the Cibolo Expressway and the Cibolo Expressway is financed as described herein, the parties' compensation or return shall be as identified within the Financial Model or the Operating Agreement (as applicable). In addition, reimbursement of "Development Capital", as defined and identified in the Financial Model, for the Cibolo Turnpike and Cibolo Expressway to the extent not paid pursuant to other provisions of this Agreement, shall be paid promptly, following the Financial Closing for any of the Project, from the proceeds of such financing, an amount equal to the Development Capital actually expended or incurred by Cibolo Turnpike to the Cibolo Turnpike and Cibolo Expressway, plus interest at a rate not to exceed 12% per annum; and.
- (ii) reimbursement shall be made to the City for staff time devoted to bringing the project to fruition and consultant fees the City incurs directly related to the project, which shall include: an amount equal to \$15,000.00 to compensate the City for staff time, and, reimbursement for legal, engineering and public relations consultant fees actually expended or incured by the City, plus interest at a rate not to exceed 12% per annum.
- Section 6.2 <u>Development Fee</u>. Promptly following the Financial Closing for the Project, Cibolo Turnpike shall be paid solely from the proceeds of such financing a Development Fee equal to 2% of the principal amount, or if sold at a net premium, issue price, of such financing.



Section 6.3 <u>Project Management Fee</u>. Cibolo Turnpike is authorized to receive an appropriate Project Management Fee to oversee and manage the development of the Project. The Project Management Fee shall equal to 3% of the estimated construction cost of the Project.

Section 6.4 <u>Operating Management Fee</u>. Cibolo Turnpike is authorized to receive an appropriate Operating Management Fee all of which is detailed under the Financial Model or the Operating Agreement, as applicable. The Operating Management Fee is to cover the operations and management of the Project.

Section 6.5 <u>City</u>. City's compensation shall be an annual split of all remaining Surplus Revenues of the Project, based on the percentages as set forth in the Financial Model, which includes a portion of those surplus funds remaining under the indenture or other documents after providing for: (1) all operation and maintenance expenses, (2) taxes, (3) all debt service on debt incurred to finance or improve the Project, (4) all contractual commitments (5) all required reserves as set forth in the Financial Model, (5) the necessary payments to Cibolo Turnpike to achieve a return on equity based on the Base Case Equity IRR.

Section 6.6 Reimbursement of City Expenses. As compensation for the City's costs incurred in connection with this Agreement, Cibolo Turnpike shall reimburse the City for staff time devoted to bringing the Project to fruition and consultant fees the City incurs directly related to the Project, which shall include: (A) an amount equal to \$15,000.00 to compensate the City for staff time, and (B) reimbursement to the City for the costs of legal, engineering and public relations consultant fees actually expended or incured by the City, plus interest at a rate not to exceed 12% per annum (accruing from the date of the City's payment of such costs through its receipt of reimbursement from Cibolo Turnpike). Cibolo Turnpike shall pay to the City these reimbursement during Phase I of Project Development (which is described in Section 4.1 hereof).

ARTICLE VII

CITY RESPONSIBILITIES

Section 7.1 <u>Cibolo Parkway Project Input, Alignment.</u> The development of Cibolo Parkway is the responsibility of Cibolo Turnpike. The City and Cibolo Turnpike will work together on the development of this portion of the Project. Cibolo Turnpike will seek input on various components of this portion of the Project. <u>The City shall offer staff assistance and provide input on the Project development.</u> The City shall provide guidance, direction and approval of the alignment of the Cibolo Parkway. Such input and approval on the alignment shall be in a timely manner. The final alignment as agreed to by the parties is not subject to changes and Cibolo Turnpike can rely on that final alignment.

Section 7.2 (a) Cibolo Expressway. The development of Cibolo Expressway will be the responsibility of Cibolo Turnpike. The alignment for Cibolo Expressway has been set as will be constructed on the Turnback FM 1103 and therefore comprise part of the FM 1103 Improvements. These improvements are in addition to the TxDOT-constructed FM 1103 Improvements to be made to such stretch of FM 1103. Cibolo Turnpike will seek input from TxDOT on the design of the Cibolo Expressway, and the alignment and such design therefor will comport with applicable TxDOT guidelines.

Section 7.3 Section 7.2 TxDOT FM 1103 Turnback. The City, collaboratively with Cibolo Turnpike, will negotiate with TxDOT on the turnback of the Turnback FM 1103 Improvements to the City. Negotiation on the Turnback FM 1103 Improvements turnback to the City shall begin with the execution of this Agreement. For the avoidance of doubt, under no circumstances shall the Turnback FM 1103 include any portion of that facility that is located within the City of Schertz, Texas. Final acceptance of the Turnback FM 1103 would occur after the results of Project Development Phase I.

ARTICLE VIII

FINANCING THE PROJECT

Section 8.1 The Project.

(a) Cibolo Turnpike shall be solely responsible for all costs associated with the design and construction of the Project and any debt service related thereto. Cibolo Turnpike may elect to undertake the Project under the Operating Agreement by either Texas Turnpike Corporation or Cibolo Turnpike or an affiliate of them.

ARTICLE IX

OPERATING AGREEMENT

- Section 9.1 Operating Agreement. The Operating Agreement to be negotiated and executed by City, to Cibolo Turnpike, the Texas Turnpike Corporation or other affiliated entity designated by Cibolo Turnpike in accordance with this Agreement, shall be substantially in the form attached to this Agreement as Appendix A. The parties further acknowledge that the evolution of the Project may call for further modifications or amendments to the Operating Agreement and the parties accordingly agree to negotiate in good faith to identify the terms of any amendment that may be reasonably necessary, and to enter into such modifications of the Operating Agreement as are called for either before or after it is executed in order substantially to preserve the economic benefits to both Cibolo Turnpike and City as set forth in the Financial Model.
- Section 9.2 Operating Agreement Terms. Subject to the provisions of <u>Section 3.1(f)</u>, the parties shall use their best efforts to negotiate the terms and provisions of an Operating Agreement prior to the end of Phase I. Such Operating Agreement shall provide, at a minimum:
 - (a) (i) The term of the Operating Agreement to run co-terminus with this Agreement;
- (b) (ii) The exclusive right and obligation to managermanage, operate, and maintain the Project, including toll collections on the tolled portions thereof (being Cibolo Expressway and Cibolo Parkway);
- (c) (iii) Included as part of the Operating Agreement are the following provisions regarding tolled and non-tolled routes:



(ii) B. All trips beginning or ending on the Cibolo Parkway shall pay that portion of the tolls applicable to and for such trip.

pay any toll relating to the Cibolo Expressway only.

- (iii) C. All "through" trips, meaning any trip that does not orginate or terminate in the City, shall pay tolls on both the Cibolo Expressway and the Cibolo Parkway; and
- (d) (iv) The remaining requirements concering Project operation specified in Section 3.1(e) hereof.

ARTICLE X REPRESENTATIVES

Section 10.1 <u>Cibolo Turnpike's Representative</u>. Upon execution of the Agreement, Cibolo Turnpike shall designate, in writing, to City, the name of the individual who is to be the Cibolo Turnpike representative (the "Cibolo Turnpike's Representative") with full authority to execute any and all instruments requiring Cibolo Turnpike's signature and to act on behalf of Cibolo Turnpike with respect to all matters arising out of this Agreement. Cibolo Turnpike's Representative shall represent the interests of Cibolo Turnpike, be responsible for overseeing all aspects of design, construction and development of the Cibolo Turnpike and Cibolo Expressway, and work closely with City's Representative (as defined below). Any consent, approval, decision or determination hereunder made by Cibolo Turnpike's Representative shall be binding on Cibolo Turnpike; provided, however, Cibolo Turnpike's Representative shall not have any right to modify, waive or amend any provision of the Agreement, or terminate the Agreement.

Section 10.2 <u>City's Representative</u>. Upon execution of this Agreement, City shall designate the City's representative (the "City's Representative") and will provide Cibolo Turnpike with written notice of the identity of such individual so designated. With respect to any action, decision or determination which is to be taken or made by City under the Agreement, City's Representative may take such action or make such decision or determination or shall notify Cibolo Turnpike in writing of the person(s) responsible for such action, decision or determination and shall forward any communications and documentation to such person(s) for response or action. Any consent, approval, decision or determination hereunder by City's Representative shall be binding on City to the extent City has the legal power to delegate to an individual the ability to give such consent or approval or make such decision or determination; provided, however, City's Representative shall not have any right to modify, waive or amend any provision of the Agreement, or terminate the Agreement. Cibolo Turnpike and any Person dealing with City in connection with the Agreement or any matter governed by the Agreement may rely and shall be fully protected in relying upon the authority and capacity of City's Representative or any such designee to act for and bind City in any such matter, to the extent that such delegation of authority is authorized by the City Charter and State law.

From time to time following the execution hereof, Cibolo Turnpike may change or replace Cibolo Turnpike's Representative and City may change or replace City's Representative



upon five (5) business days' written notice to the other party, delivered to such party in the manner and at the address indicated in Section <u>13.7 hereof.13.7.</u>



DEFAULT, ABANDONMENT

Section 11.1 <u>Events of Default by City</u>. The following shall constitute Events of Default by City under this Agreement:

- (a) Failure to observe or perform any material term, provision, condition or obligation under the Agreement, and failure to cure such default within thirty (30) days following notice or discovery of such default; provided, however, that if the failure to observe or perform cannot reasonably be cured within the thirty (30) day period, the failure to observe or perform will not constitute an Event of Default if City begins corrective action within the thirty (30) day period and thereafter proceeds with reasonable diligence to effect the cure as soon as practicable.
- (b) Any material representation or warranty made by City that is false, misleading or inaccurate in any material respect at the time made.
- (c) The failure of City to honor Cibolo Turnpike's option to enter into the Operating Agreement.
 - (d) Default under the Operating Agreement.
- (e) City shall (i) apply for or consent to, or become subject to, the appointment of or the taking of possession by a receiver, liquidator, custodian or trustee of itself or of all or a substantial part of its property, (ii) admit in writing its inability, or be generally unable, to pay its debts as such debts generally become due, (iii) make a general assignment for the benefit of its creditors, (iv) commence a voluntary case under the Federal Bankruptcy Code (as now or hereafter in effect), (v) file a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or adjustment of debts, (vi) take any action for the purpose of effecting any of the foregoing, or (vii) be adjudicated as bankrupt or insolvent by any court.
- (f) Final legislative, administrative or judicial action after the date hereof that limits City's authority so as to materially and adversely affect its ability to perform its obligations under this Agreement or the Operating Agreement and City does not enter into an amendment to this Agreement as provided in Section 12.3 within thirty (30) days of such final legislative, administrative or judicial action. However, no future legislative changes shall ever cause the financial obligations related to the Tollway to become obligations of the City.
- Section 11.2 <u>Events of Default by Cibolo Turnpike</u>. The following shall constitute Events of Default by Cibolo Turnpike under the Agreement:
- (a) Failure to observe or perform any material term, provision, condition or obligation under the Agreement and failure to cure such default within thirty (30) days following notice or discovery of such default; provided, however, if the failure to observe or perform cannot

reasonably be cured within the thirty (30) day period, the failure to observe or perform will not be an Event of Default if Cibolo Turnpike begins corrective action within the thirty (30) day period and thereafter proceeds with reasonable diligence to effect the cure as soon as practicable.

- (b) Any representation or warranty made by Cibolo Turnpike that is false, misleading or inaccurate in any material respect at the time made.
- (c) Abandonment by Cibolo Turnpike except as specifically permitted by the Agreement.
- (d) Cibolo Turnpike shall (i) apply for or consent to, or become subject to, the appointment of or the taking of possession by a receiver, liquidator, custodian or trustee of itself or of all or a substantial part of its property, (ii) admit in writing its inability, or be generally unable, to pay its debts as such debts generally become due, (iii) make a general assignment for the benefit of its creditors, (iv) commence a voluntary case under the Federal Bankruptcy Code (as now or hereafter in effect), (v) file a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or adjustment of debts, (vi) take any action for the purpose of effecting any of the foregoing, or (viii) be adjudicated as bankrupt or insolvent by any court.

Section 11.3 Remedies for City Default.

- (a) Upon the occurrence and continuance of an Event of Default by City under the Agreement, which City fails to cure, Cibolo Turnpike may suspend performance under the Agreement and Cibolo Turnpike will have such remedies as may be available to it law or in equity, subject to the limitations on adjudicated awards as set out in Texas Local Government Code Chapter 271 Subchapter I, which shall be controlling.
- (b) Upon the occurrence and continuance of an Event of Default by City under Section 11.1(a) of this Agreement, Cibolo Turnpike shall be entitled to injunctive relief against City.
- (c) Upon the occurrence and continuance of an Event of Default by City under the Agreement, Cibolo Turnpike may terminate this Agreement by delivering notice in writing to City specifying the nature of the Event of Default and establishing a termination date, which date shall not be less than thirty (30) days following the date of delivery of the notice whereupon the Agreement shall terminate on the specified termination date unless City shall have cured the Event of Default by such date, in which case the notice of termination shall be cancelled. Liabilities of City accruing under this Agreement prior to the date of termination shall survive any termination.
- (d) Without prejudice to any other rights and remedies that the other party may have, each of the parties agrees that damages may not be an adequate remedy for a breach of Section 11.1(a) of the Agreement, and that the other party will, in such case, be entitled to the remedies of injunction, specific performance or other equitable relief for any threatened or actual breach of Section 11.1(a) of this Agreement.

Section 11.4 Remedies for Cibolo Turnpike Default.

- COPY (a) Upon the occurrence and continuance of an Event of Default by Cibolo Turnpike under this Agreement, City may suspend performance under this Agreement and City will have such remedies as may be available under this Agreement.
- Upon the occurrence and continuance of an Event of Default by Cibolo Turnpike under the Agreement, City may terminate this Agreement by delivering notice in writing to Cibolo Turnpike specifying the nature of the Event of Default and establishing a termination date, which date shall be not less than thirty (30) days following the date of delivery of the notice whereupon this Agreement shall terminate on the specified termination date unless Cibolo Turnpike shall have cured the Event of Default by such date, in which case the notice of termination shall be cancelled. Liabilities of Cibolo Turnpike accruing under this Agreement prior to the date of termination shall survive any termination.
- (c) Upon the occurrence and continuance of an Event of Default by Cibolo Turnpike under this Agreement, which Cibolo Turnpike fails to cure, and which constitutes a material misrepresentation, a negligent act or omission, or gross negligence, or recklessness, or willful misconduct by Cibolo Turnpike or any of its partners, contractors, agents or affiliates in connection with the Project or City may suspend performance under this Agreement and the City shall have such remedies as may be available to it law or in equity; including but not limited to recovery of actual damages the City may incur as a result of the breach.
- Without prejudice to any other rights and remedies that the other party may have, each of the parties agrees that damages may not be an adequate remedy for a breach of Section 11.2(a) of the Agreement, and that the other party will, in such case, be entitled to the remedies of injunction, specific performance or other equitable relief for any threatened or actual breach of Section 11.2(a) of the Agreement.
- Upon the occurrence and continuance of an Event of Default by Cibolo Turnpike under Section 11.2(a) of the Agreement, City shall be entitled to injunctive relief against Cibolo Turnpike.

ARTICLE XII

REPRESENTATIONS AND WARRANTIES

- Section 12.1 Cibolo Turnpike's Representations and Warranties. Cibolo Turnpike hereby represents and warrants to City that:
- Organization. Cibolo Turnpike is a Texas limited partnership duly formed, validly existing and in good standing under the laws of the State. Cibolo Turnpike has all requisite power and authority to enter into the Agreement and to perform its obligations hereunder.
- Authorization; No Violation. The execution, delivery and performance by Cibolo Turnpike of this Agreement have been duly authorized by all necessary action and will not

violate the organizational documents of Cibolo Turnpike or result in the breach of or constitute a default under any loan or credit agreement, other material agreement, judgment or decree to which Cibolo Turnpike is a party or by which Cibolo Turnpike, or its material assets, may be bound or affected; the Agreement has been duly executed and delivered by Cibolo Turnpike and the Agreement and the documents referred to herein constitute valid and binding obligations of Cibolo Turnpike subject to bankruptcy, reorganization, moratorium and other laws relating to the enforcement of creditors' rights generally and to general equitable principles (regardless of whether enforcement is sought in a proceeding at law or in equity).

- (c) <u>Litigation</u>. No suit is pending against or affecting Cibolo Turnpike which could reasonably be expected to have a material adverse effect upon Cibolo Turnpike's performance under the Agreement or the financial condition or business of Cibolo Turnpike. There are no outstanding judgments against Cibolo Turnpike which would have a material adverse effect upon its assets, properties or franchises.
- (d) No Violation of Laws. Cibolo Turnpike has received no notice as of the date of the Agreement asserting any noncompliance in any material respect by Cibolo Turnpike with applicable statutes, rules and regulations of the United States of America, of the State, or of any other state or municipality or agency having jurisdiction over and with respect to the transactions contemplated in and by this Agreement; and Cibolo Turnpike is not in default with respect to any judgment, order, injunction or decree of any court, administrative agency, or other governmental authority which is in any respect material to the transactions contemplated hereby.
- Section 12.2 <u>City's Representations and Warranties</u>. As of the date of this Agreement, City makes the following representations and warranties to Cibolo Turnpike:
- (a) <u>Organization</u>. City is a public body and a political subdivision of the State and has all requisite power and authority to enter into this Agreement and to perform its obligations hereunder.
- (b) <u>Authorization; No Violation</u>. The execution, delivery and performance by City of this Agreement have been duly authorized by all necessary action and will not violate City's Home Rule Charter, ordinances, resolutions, or any applicable laws, or result in the breach of any material agreement, judgment or decree to which City is a party; this Agreement has been duly executed and delivered by City and the Agreement and the documents referred to herein constitute valid and binding obligations of City enforceable against City in accordance with its terms subject to bankruptcy, reorganization, moratorium and other laws relating to the enforcement of creditors' rights generally and to general equitable principles (regardless of whether enforcement is sought in a proceeding at law or in equity).
- (c) <u>Litigation</u>. No suit is pending against or affecting City which could reasonably be expected to have a material adverse effect upon City's performance under this Agreement.
- (d) <u>No Violation of Laws</u>. City has received no notice as of the date of this Agreement asserting any noncompliance in any material respect by City with applicable statutes, rules and regulations of the United States of America, the State or any agency having jurisdiction over and with respect to the transactions contemplated in and by this Agreement, and City is not

in default with respect to any judgment, order, injunction or decree of any court, administrative agency, or other governmental authority which is in any respect material to the transactions contemplated hereby.

Section 12.3 <u>Mutual Representations and Warranties; Restructure Due to Legislative, Administrative or Judicial Actions.</u> In the event of a final legislative, administrative or judicial action after the date hereof that limits Cibolo Turnpike's authority or the City's authority so as to materially and adversely affect either of said party's ability to perform its obligations under this Agreement, City and Cibolo Turnpike will in good faith negotiate changes to this Agreement reasonably acceptable to both parties that accomplish the purposes of this Agreement in a manner that preserves to the extent reasonably possible the economic benefits to both Cibolo Turnpike and City as set forth in the Financial Model.

ARTICLE XIII

MISCELLANEOUS

Section 13.1 <u>Uncontrollable Circumstances</u>. An "Uncontrollable Circumstance" is an event or circumstance, including an action of a governmental entity or a change in law, which prevents a party from performing its obligations under an agreement or which materially increases the time for performing under an agreement, which event or circumstance was not anticipated as of the date of the agreement, which is not within the reasonable control of, or the result of the negligence of, the claiming party, and which, by the exercise of due diligence, the claiming party is unable to overcome or avoid or cause to be avoided. Except as otherwise herein expressly provided, if either City or Cibolo Turnpike shall be delayed or hindered in, or prevented from, the performance of any covenant or obligation hereunder (other than the payment of money), as a result of any Uncontrollable Circumstance, and, provided that the party delayed, hindered or prevented from performing notifies the other party both of the commencement and of the expiration of such delay, hindrance or prevention (each notice being required within ten (10) business days of the respective event), then the performance of such covenant or obligation shall be excused for the period of such delay, hindrance or prevention and the period for the performance of such covenant or obligation shall be extended by the number of days equivalent to the number of days of the impact of such delay, hindrance or prevention. Failure to so provide the foregoing notice will not result in waivers of either an excuse in performance or an extension of time to perform under this Section 13.1 with respect to any such delay, hindrance or prevention.

Section 13.2 Amendment; Waiver. No alteration, amendment or modification hereof shall be valid unless executed by an instrument in writing by City and Cibolo Turnpike with the same formality as this Agreement. The failure of City or Cibolo Turnpike to insist in any one or more instances upon the strict performance of any of the covenants, agreements, terms, provisions or conditions of this Agreement or to exercise any election or option herein contained shall not be construed as a waiver or relinquishment for the future of such covenant, agreement, term, provision, condition, election or option, and shall not be deemed to establish a course of conduct among the parties, but the same shall continue and remain in full force and effect. No waiver by City or Cibolo Turnpike of any covenant, agreement, term, provision or condition,

election or option of this Agreement shall be deemed to have been made unless expressed in writing and signed by an appropriate official on behalf of Cibolo Turnpike or City. The parties acknowledge that at the time this Agreement is executed, the precise details and scope of the Project have not yet been determined. Moreover, the parties acknowledge and agree that future efforts to pursue the development of the Project will evolve over time, and that subsequent developments may impact the terms of this Agreement and call for a modification or amendment of this Agreement. Accordingly, the parties agree to negotiate mutually and in good faith to enter into such amendments or modifications of this Agreement as may reasonably be indicated by the subsequent details that evolve concerning the Project that preserve the economic benefits to both Cibolo Turnpike and City as set forth in the Financial Model.

Section 13.3 <u>Consent</u>. Unless otherwise specifically provided herein, no consent or approval by City or Cibolo Turnpike permitted or required under the terms of the Agreement shall be valid or be of any validity whatsoever unless the same shall be in writing, signed by the party by or on whose behalf such consent is given.

Section 13.4 <u>Severability</u>. If any provision of this Agreement is held by final judgment of a court of competent jurisdiction to be invalid, illegal or unenforceable, such invalid, illegal or unenforceable provision shall be severed from the remainder of the Agreement, and the remainder of this Agreement shall be enforced. In addition, the invalid, illegal or unenforceable provision shall be deemed to be automatically modified, and, as so modified, to be included in this Agreement, such modification being made to the minimum extent necessary to render the provision valid, legal and enforceable. Notwithstanding the foregoing, however, if the severed or modified provision concerns all or a portion of the essential consideration to be delivered under this Agreement by one party to the other, the remaining provisions of this Agreement shall also be modified to the extent necessary to equitably adjust the parties' respective rights and obligations hereunder.

Section 13.5 <u>Binding Effect</u>. Except as may otherwise be provided herein to the contrary, this Agreement and each of the provisions hereof shall be binding upon and inure to the benefit of Cibolo Turnpike and City, and their respective permitted successors and assigns.

Section 13.6 <u>Relationship of Parties</u>. Nothing contained in this Agreement shall be deemed or construed by City or Cibolo Turnpike hereto or by any third party to create a relationship, partnership, joint venture or any association between Cibolo Turnpike and City.

Section 13.7 <u>Notices</u>. Except as otherwise provided herein, all notices, demands, consents, approvals, statements, requests and invoices to be given under this Agreement shall be in writing, signed by the party or officer, agent or attorney of the party giving the notice, and shall be deemed effective upon receipt if hand delivered or if sent by telecopy with transmission confirmation or overnight courier service; and if sent by the United States mail, postage prepaid, certified mail, return receipt requested, then it shall be deemed effective three (3) business days after mailing or the date of refusal, addressed as follows:

To City:

City of Cibolo 200 S. Main St. Cibolo, Texas 78108

Attn: Robert T. Herrera, City Manager



To Cibolo Turnpike:

Cibolo Turnpike L.P.

25 Highland Park Village #100-758

Dallas, Texas 75205

Attn: John N. Crew, Manager

Either City or Cibolo Turnpike may from time to time by written notice given to the other pursuant to the terms of this <u>Section 13.7</u> change the address or designees to which notices shall be sent or designate one or more additional Persons to whom notices are to be sent.

Section 13.8 Governing Law. This Agreement and any matter relating to this Agreement, including any matter in contract or tort or in equity or at law, shall be governed by the laws of the State of Texas without regard to principles of conflicts of law that direct the application of the laws of a different state. If the parties do not agree to arbitration with respect to a particular claim or dispute in accordance with the terms of this Agreement, the parties agree that any legal action shall be brought in a state or federal court of competent jurisdiction in Guadalupe County, Texas, and the parties agree to establish venue in such county. The parties further agree that any such lawsuit that may be brought shall be tried by the court, without a jury.

Section 13.9 <u>Effective Date</u>. This Agreement shall be a legally binding agreement, in full force and effect, as of the date set forth in the first paragraph of this Agreement.

Section 13.10 <u>Further Assurances</u>. City and Cibolo Turnpike shall execute, acknowledge and deliver, after the date hereof, without additional consideration, such further assurances, instruments and documents, and shall take such further actions, as Cibolo Turnpike or City shall reasonably request of the other in order to fulfill the intent of this Agreement and the transactions contemplated hereby.

Section 13.11 <u>Third-Party Beneficiary</u>. The provisions of this Agreement are for the exclusive benefit of City and Cibolo Turnpike and not for the benefit of any third person, nor shall this Agreement be deemed to have conferred any rights, express or implied, upon any third person unless otherwise expressly provided for herein.

Section 13.12 <u>Counterparts</u>. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

Section 13.13 <u>Prior Agreements Superseded</u>. This Agreement supersedes any prior understanding or written or oral agreements between City or Cibolo Turnpike respecting the within subject matter, and contains the entire understanding between the parties with respect thereto. There are no oral agreements between City and Cibolo Turnpike.



Section 13.14 <u>Language</u>. The language used in this Agreement shall be deemed to be the language chosen by the parties hereto to express their mutual intent, and no rule of strict construction shall be applied against any party.

Section 13.15 <u>Computing Time, Saturday, Sunday or Holiday</u>. The day of an act, event, or default after which a designated period begins to run is not included when computing a period prescribed or allowed in this Agreement. The last day of the period is included, but if that day is a Saturday, Sunday or legal holiday of the City, the period extends to the end of the next day that is not a Saturday, Sunday or legal holiday.

Section 13.16 <u>Approvals by City</u>. No approval by City shall impose, imply or be construed as an assumption by City of any duties or responsibilities of others with respect to the design or construction of the Project or for the construction means and methods employed by or on behalf of Cibolo Turnpike or any person retained by or on behalf of Cibolo Turnpike.

Section 13.17 <u>Lawsuits</u>. To the extent permitted by law, and without imposing a future debt obligation on the City, City agrees to cooperate with and assist Cibolo Turnpike in connection with initiating or defending any actions, including mediation, arbitration, or state or federal administrative or court proceedings, against or brought by third parties that threaten to stop, delay or increase the cost of (a) completion of the Project, (b) the imposition or collection of any revenue necessary for the funding of the Project, (c) the remediation, if necessary, of the Project Site, and (d) the negotiation, execution, or implementation of this Agreement or any other agreement between City and Cibolo Turnpike or otherwise related to the Project, including the enforcement of any indemnity provisions.

Section 13.18 Attorneys' Fees. In the event of any controversy, claim or dispute between City or Cibolo Turnpike arising from or relating to this Agreement (whether in litigation or arbitration, and including the enforcement of any indemnity provisions), the prevailing party shall be entitled to recover reasonable and necessary costs, expenses and attorneys' fees. For all purposes of this Agreement and any other documents relating to the Agreement, the terms "attorneys' fees" or "counsel fees" shall be deemed to include paralegals' and legal assistants' fees, and wherever provision is made herein or therein for the payment of attorneys' or counsel fees or expenses, such provision shall include such fees and expenses (and any applicable sales taxes thereon) incurred in any and all judicial, bankruptcy, reorganization, administrative or other proceedings, including appellate proceedings, whether such fees or expenses arise before proceedings are commenced or after entry of a final judgment.

Section 13.19 <u>Assignment</u>. Except for the City assignment to an instrumentality upon City creation thereof at any time (which may occur without the consent of Cibolo Turnpike), any assignment by either party must have the written consent of the other, such consent not to be unreasonably withheld. In the event that the City makes an assignment to an instrumentality, City shall notify Cibolo Turnpike thereof. Any purported assignment in violation of this <u>Section 13.19</u> shall be void. This section shall not limit the ability of Cibolo Turnpike to contract with any third party, including its own affiliates, to provide services to or in support of the Project.

Section 13.20 <u>Time of the Essence</u>. Subject to the terms hereof, time is of the essence with respect to the performance of each of the covenants and obligations contained in this Agreement.

Section 13.21 Mediation.

- (a) Any claim, dispute, or other matter in question arising out of or related to the Agreement shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.
- (b) City and Cibolo Turnpike shall endeavor to resolve claims, disputes and other matters in question between them by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association then currently in effect. Request for mediation shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of thirty (30) days from the date of filing unless stayed for a longer period by agreement of the parties or court order.
- (c) City or Cibolo Turnpike agree to split the mediator's fee and any filing fees equally. The mediation shall be held in Guadalupe County, Texas, unless another location is mutually agreed upon. Written agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

Section 13.22 <u>Dispute Resolution</u>. Any claim, dispute or other matter in question arising out of or related to this Agreement or otherwise arising from the design and construction of the Project, shall first be subject to mediation in accordance with the provisions of Section 13.21 prior to instituting litigation. Claims, disputes and other matters in question between the parties may be decided by arbitration, but only if both Cibolo Turnpike and City so agree at the time the dispute arises.

Section 13.23 <u>Arbitration</u>. <u>Intentionally deleted SECTION INTENTIONALLY DELETED</u>.

Section 13.24 <u>Injunctive Relief</u>. Notwithstanding the foregoing, the provisions of <u>Section 13.22</u> and <u>Section 13.23</u> shall not apply to an action for injunctive relief or a writ of mandamus filed in connection with this Agreement.

Section 13.25 Confidentiality; Open Records Act.

- (a) Each party to this Agreement agrees to keep confidential and not use, reveal, provide or transfer to any third party any Confidential Information (as defined below) it obtains or has obtained concerning the other party to this Agreement or the Project, except as follows:
- (i) subject to Section 13.25(b), to the extent that disclosure to a third party is required by applicable law or regulation;

- (ii) information which, at the time of disclosure, is generally available to the public (other than as a result of a breach of this Agreement or any other confidentiality agreement to which a party to this Agreement is a party or of which it has knowledge), as evidenced by generally available documents or publications;
- (iii) information that was in its possession prior to disclosure (as evidenced by appropriate written materials) and was not acquired directly or indirectly from any other party to this Agreement;
- (iv) to the extent disclosure is necessary or advisable, to its employees, consultants or advisors, or to its affiliates or their employees, consultants or advisors, in each case solely for the purpose of carrying out their duties under this Agreement;
- (v) to banks or other financial institutions or agencies or any independent accountants or legal counsel or investment advisors employed in connection with the Project, or by any party to this Agreement, to the extent disclosure is necessary or advisable to obtain financing, including, without limitation, the Project financing and the raising of the Development Capital by Cibolo Turnpike;
- (vi) to potential investors in connection with the Project financing and raising the Development Capital;
- (vii) to potential purchasers of a party to this Agreement or any affiliate of a party to this Agreement that directly or indirectly owns an equity interest in such party to this Agreement;
- (viii) to the extent necessary, disclosure to third parties to enforce this Agreement;
 - (ix) to another party to this Agreement; or
- (x) to parties that have signed or agreed to be bound by this confidentiality provision; provided, however, that in each case of disclosure pursuant to (iv), (v), (vi), (vii) or (ix), the persons or entities to whom disclosure is made agree to be bound by this confidentiality provision. The obligation of each party not to disclose Confidential Information except as provided herein shall not be affected by the termination of this Agreement. As used in this Section, the term "Confidential Information" shall mean information, which is clearly marked confidential, concerning this Agreement and the properties, operations, business, trade secrets, technical know-how and other non-public information and data of or relating to the parties to this Agreement or the Project.

The restrictions on disclosure of Confidential Information set forth above in <u>Section 13.25(a)</u> shall lapse two (2) years from the date of the termination of the Project. In the event a party withdraws from the Project, such party shall remain subject to the restrictions on disclosure of Confidential Information for two (2) years from the date of such party!'s withdrawal.

(b) If any Person requests City to disclose any Confidential Information under the Texas Open Records Act (Tex. Gov't Code Ann. § 552.001 et seq.) or equivalent or successor statute (the "Open Records Act"), prior to making such disclosure, City shall notify Cibolo Turnpike of such request, in which case Cibolo Turnpike shall promptly and timely inform City

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whether any of the requested materials constitute confidential, proprietary, commercial, financial or trade secret information of Cibolo Turnpike which may be exempted from disclosure under the Open Records Act, and, in that event, City and Cibolo Turnpike shall cooperate with each other in preparing appropriate responses or filings to the Attorney General of the State and to any Person making such request, including any appeals involved therein, to prevent a disclosure of such information. In such event, each party shall further cooperate with the other to promptly identify any possible third party whose privacy or property interests may be implicated by any such request to disclose information in order to enable Cibolo Turnpike to timely furnish to any such third party any statutory notice required by the Open Records Act and seek any applicable exemptions from disclosure under the Open Records Act. So long as Cibolo Turnpike is pursuing the actions described above in a timely manner, City shall protect confidential, proprietary or trade secret information of Cibolo Turnpike as to which Cibolo Turnpike requests City to do so, unless otherwise compelled by court order, or by opinion of the Texas Attorney General. All reasonable and necessary costs associated with City's cooperation with Cibolo Turnpike hereunder in connection with any proceedings shall be borne by Cibolo Turnpike, and City shall be fully reimbursed for any of such costs it has reasonably incurred including reasonable attorneys' fees.

Section 13.26 No Recourse to Cibolo Turnpike. The obligations of Cibolo Turnpike under this Agreement are recourse solely to the interest of Cibolo Turnpike in the Project. No recourse or liability shall be had against any director, officer, employee, agent, member shareholder or partner of Cibolo Turnpike or of Texas Turnpike Corporation or their respective affiliates.

Section 13.27 Waiver of DTPA. CITY AND CIBOLO TURNPIKE HAVE ASSESSED THEIR RESPECTIVE RIGHTS, LIABILITIES AND OBLIGATIONS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION ACT, SECTION 17.41 ET SEQ., BUSINESS & COMMERCE CODE (THE "DTPA"). THE PARTIES AGREE THAT THE DTPA DOES NOT APPLY TO EITHER CITY OR CIBOLO TURNPIKE BECAUSE NEITHER QUALIFY AS A "CONSUMER" UNDER SECTION 17.45(4) OF THE DTPA. BUT IN THE EVENT THE DTPA IS DEEMED TO BE APPLICABLE BY A COURT OF COMPETENT JURISDICTION, CITY AND CIBOLO TURNPIKE HEREBY WAIVE THEIR RIGHTS UNDER THE DTPA, A LAW THAT GIVES CONSUMER SPECIAL RIGHTS AND PROTECTIONS. AFTER CONSULTATION WITH ATTORNEYS OF THEIR OWN SELECTION, CITY AND CIBOLO TURNPIKE CONSENT TO THIS WAIVER. THE PARTIES AGREE THAT THIS SECTION 13.27 CONSTITUTES A CONSPICUOUS LEGEND.

[Signature page follows.]

[Signature page follows,]

nent to be executed beir respective seals

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their proper officers respectively, being thereunto duly authorized, and their respective seals to be hereto affixed, as of the day and year first above written.

City of Cibolo, Texas:

3y:____

Allen Dunn

Mayor, City of Cibolo

Attest:

By:

Peggy Cimics, City Secretary

Cibolo Turnpike:

On behalf of CIBOLO TURNPIKE, LP, a Texas limited partnership

By:

CIBOLO TURNPIKE, GP, LLC,

a Texas limited liability company, its General

Partner

By:

TEXAS TURNPIKE CORPORATION, a Texas corporation, its Sole Member and

Sole Manager

By:

John N. Crew, President and

Chief Executive Officer

EXHIBIT 1



PROJECT MAP

[Unchanged from Existing Agreement]



EXHIBIT 2

CIBOLO EXPRESSWAY CONCEPTUAL DESIGN



APPENDIX A FORM OF OPERATING AGREEMENT

[Unchanged from Existing Agreement]

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EXHIBIT C AMENDMENT



28227752.2 C-1



FIRST AMENDED AND RESTATED DEVELOPMENT AGREEMENT

between

the City of Cibolo, Texas

and

Cibolo Turnpike L.P.

COPY

FIRST AMENDED AND RESTATED DEVELOPMENT AGREEMENT

This First Amended and Restated Development Agreement (the "Agreement") is made and entered into as of May 9, 2017 (the "Effective Date") by and between the City of Cibolo, Texas ("City"), and Cibolo Turnpike L.P., a Texas limited partnership ("Cibolo Turnpike") for the purpose of memorializing certain amendments to the Development Agreement (the "Initial Development Agreement") entered into by the City and Cibolo Turnpike by action of the City Council of the City taken on February 28, 2017.

Representatives of the City, the Texas Department of Transportation ("TxDOT"), and Cibolo Turnpike, by and among themselves, have engaged in meaningful discussions identifying both a transportation improvement and a significant economic development project that, consistent with the scope of the City's Thoroughfare Plan and Land Use Plan, would benefit the City and the area around the proposed Project (as detailed below). The parties to the Agreement believe that the Project offers a number of diverse, ongoing opportunities to maximize the economic benefits and opportunities for public and private entities within the City derived from a limited-access high speed tolled highway. These benefits realized throughout the City include: (1) an alternative separated grade crossing over the Union Pacific Railroad and FM 78; (2) a bridged crossing over the frequently prone-to-flooding Cibolo Creek watershed; (3) additional high speed northwest-southeast highway capacity; (4) development opportunities along the proposed Project; (5) development, maintenance and diversification of the economy of the State; (6) fostering the growth of enterprises based in the San Antonio metropolitan area and; (7) development and expansion of transportation and commerce within the State.

On February 28, 2017, the City Council of the City authorized the City's entering into and execution of the Initial Development Agreement between the City and the Cibolo Turnpike. This Agreement, which is an amendment and restatement of the Initial Development Agreement, is now executed by such parties to clarify certain aspects of the hereinafter-defined and described Project that is the subject hereof and to eliminate reference to any Project component located in the City of Schertz, Texas. On the Effective Date, this Agreement replaces and supersedes in all manner and respect the Initial Development Agreement.

PROJECT OVERVIEW

The Project that is the subject of this Agreement is comprised of three interrelated components: (1) the "Cibolo Parkway" (as further described and defined in Section 3.1(a) hereof), which is generally the design, build, finance, operation and maintenance of a new toll road facility extending approximately 7 miles from the intersection of Weil Road and FM 1103 southeast to IH 10, (2) the "Cibolo Expressway" (as further described and defined in Section 3.1(b) hereof), which generally consists of three "flyover" lanes on FM 1103 over Orth Lane, Green Valley Road, and near or around Saddle Spoke Road/Gatewood Bay, being three cross streets within the City and that intersect FM 1103, which "flyover" lanes are in addition to the improvements to the approximately 2.8 mile corridor of FM 1103 (from the City's corporate limits near the intersection of FM 1103 and Chelsea/Old Wiederstein Road to the intersection of FM 1103 and Rodeo Way) to be constructed by TxDOT (such TxDOT-constructed

improvements, as further described and defined herein, the "FM 1103 Improvements"), and (3) maintenance and operation of the foregoing by Cibolo Turnpike. Accordingly the term "Project" means the (1) design, build and finance of the Cibolo Expressway and the Cibolo Parkway and (2) operation and maintenance of the FM 1103 Improvements that are "turned back" to the City (such portion of the FM 1103 Improvements herein referred to as the Turnback FM 1103), the Cibolo Expressway, and the Cibolo Parkway. Each Project component, as more fully described herein, is shown on the Project map attached hereto and incorporated by reference as Exhibit 1; conceptual depictions of the Cibolo Expressway are shown in Exhibit 2 and are also incorporated herein by reference.

Toll Road Feasibility Process

The City formed a Blue-Ribbon Committee comprised of diverse community members to consider the idea / concept of a toll road within the community and to be part of the City's thoroughfare plan. The Blue-Ribbon Committee fully endorsed the toll road concept and recommended that the City further advance the toll road.

The City with Cibolo Turnpike's assistance performed a Feasibility Study to analyze the viability of a possible toll road facility in the City. The Feasibility Study considered the projected traffic and revenue and estimated project costs. In addition, as part of the study process a series of City public hearings were held to gather citizen input about this possible Project. The City reviewed and accepted the Feasibility Study, and voted to move forward with the process to develop the Project.

Cibolo Expressway (FM 1103 – Improvements)

TxDOT, in addition to planned improvements to other sections of FM 1103, is currently planning improvements on FM 1103 from the City's corporate limits near the intersection of FM 1103 and Chelsea/Old Wiederstein Road to Rodeo Way Drive. The proposed TxDOT improvements are to widen the existing two-lane facility to four-lanes, including raised medians and left turn lanes, two 5' bike lanes, curbs and gutters, underground storm sewer system, and 6' sidewalks along both sides of the roadway (collectively referred to as the "FM 1103 Improvements"). The City will request TxDOT that the design for the FM 1103 Improvements along that stretch of FM 1103 hereafter defined as the Turnback FM 1103 accommodate the Cibolo Expressway.

Under TxDOT's "Turnback Program" the City will request that upon TxDOT's completion of the FM 1103 Improvements that TxDOT transfer to it (or an instrumentality thereof) ownership of FM 1103 from the City's corporate limits near the intersection of FM 1103 and Chelsea/Old Wiederstein Road to Weil Road including the right-of-way or "ROW" (the "Turnback FM 1103").

Cibolo Turnpike proposes to construct the Cibolo Expressway as improvements to the Turnback FM 1103 in addition to the TxDOT-constructed FM 1103 Improvements to such section of FM 1103. The Cibolo Expressway will be funded solely by Cibolo Turnpike; and, as provided herein (and to the extent practicable), the construction of the Cibolo Expressway shall be coordinated with TxDOT so that its construction shall occur simultaneously with the

construction of the proposed TxDOT-constructed FM 1103 Improvements in order to minimize traffic disruption on FM 1103.

Cibolo Parkway

Cibolo Parkway is the proposed new toll road facility from the intersection of Weil Road and FM 1103 to the Zuehl Road Exit on I-10 approximately 7 miles long. Cibolo Turnpike, on the City's behalf, will develop Cibolo Parkway that will include the design (with a concrete surface in accordance with TxDOT standards for roads having similar size and scope), environmental studies, right-of-way acquisition, construction, maintenance, and operation.

Project Development Process

Cibolo Turnpike will develop the Project in two phases, with Phase I being development of a Pro Forma Model to verify the financial viability of the Project, and Phase II being the detail design, ROW acquisition, and construction of the Project. As the Project develops, the parties retain the ability to add additional components to provide drivers with an improved transportation experience and improved access to destinations.

RECITALS

- A. Essential transportation improvements in and around the City are required to satisfy the accelerated growth being experienced there. Financial assistance from the State is not currently available for all of the City's approved and critical projects; therefore, the City has resourced another alternative to help provide the funding it needs.
- B. Extensive, prime economic development opportunities exist in an area of the City bound by the FM 78 on the west and IH-10 on the east. These opportunities include commercial and residential growth along both of these major transportation corridors, as well as new improvements to the City's infrastructure that will implement and manage planned growth for this undeveloped area of the City.
- C. The City has determined that it would be in its best interests, in fulfilling its public purpose and legislative mandate, to develop a limited-access high speed tolled highway to satisfy economic and population growth issues as well as to provide an alternate southeast/northwest route separated grade crossing over the Union Pacific Railroad and FM 78, between IH-35 and IH-10.
- D. The City wishes to further define the feasibility of the Project, and thus Cibolo Turnpike will undertake studies, including the Pro Forma Model, to determine whether the Project appears to be feasible (financially and otherwise), and to determine whether surplus revenues under the Operating Agreement (as hereinafter defined) can be expected to support a significant portion, if not all, of the Project's projected construction, operation and maintenance, and finance costs.
- E. As evidence of the City's desire to advance the Project, and in furtherance of the Blue-Ribbon Committee's recommendations the City will do the following: execute this

Initials: CITY

Agreement; petition the Alamo Area Metropolitan Planning Organization (the "AAMPO") for the adoption of the Project and formally place the Project on the funded portion of the AAMPO's Metropolitan Transportation Plan; and request that TxDOT enter into a Memorandum of Understanding with Cibolo Turnpike for the development of the Project.

NOW, THEREFORE, in consideration of the premises, covenants, agreements and obligations contained herein, the parties do hereby agree as follows:

ARTICLE I

SUBJECT OF AGREEMENT

A. Purpose of This Agreement

The purpose of this Agreement is for the development, finance, operation, management, and maintenance of the Project by Cibolo Turnpike. This Agreement defines the development of the Project, and an Operating Agreement defines the Project operating terms all as mutually agreed upon by the Parties.

B. Parties to This Agreement

The City is a home rule municipality, exercising governmental functions and powers as a home rule city in the State of Texas. The "City," as used in this Agreement includes the City of Cibolo, Texas, and any assignee of, instrumentality of, or successor to its rights, powers, and responsibilities.

Cibolo Turnpike, LP, is a Texas limited partnership and Cibolo Turnpike, GP, LLC, a Texas limited liability company, is its sole general partner created for the development and operation of the Project.

ARTICLE II

TERM AND CANCELLATION

Section 2.1

- (a) This Agreement shall be for a term of fifty (50) years, plus additional time, as needed to conform with the Financial Model, beginning on the effective date of the Initial Development Agreement (the "Term"). The Operating Agreement as part of this program will run co-terminus with the Development Agreement.
- (b) The City hereby authorizes, permits and grants a non-exclusive right to Cibolo Turnpike, and to all agents, representatives, consultants, employees, and invitees of Cibolo Turnpike, easement, right-of-way, ingress, egress, access, and use rights in, over, upon, across and along all ingress, egress and access portions of all streets adjacent to the Project belonging to the City, to Cibolo Turnpike's for the development and operation of the Project and/or otherwise

Initials: CITY A CIBOLO TU



as provided for in this Agreement. Any temporary road closures and / or temporary detours will be coordinated with the City.

ARTICLE III

GENERAL CONTRACT PROVISIONS

Section 3.1 General Contract Provisions. Notwithstanding anything in this Agreement to the contrary, to the extent applicable, any and every contract Cibolo Turnpike may negotiate or execute under the authority of this Agreement, either on behalf of itself, behalf of the City, or both itself and the City shall be subject to terms and conditions of this Section 3.1, which are as follows:

- (a) Cibolo Parkway:
 - (i) Land Acquistion.
 - A. Costs. At its sole cost and expense, Cibolo Turnpike shall acquire in the name of the City (or an instrumentality thereof) all necessary ROW for the Cibolo Parkway.
 - B. Land Acquisition Process. Cibolo Turnpike shall negotiate Cibolo Parkway facility land acquisition transactions on a fair-market price basis, as determined by independent appraisals; and, the City's institution of eminent domain shall only be used as a last resort for the acquisition of any new ROW. In the event that eminent domain is determined to be necessary, Cibolo Turnpike shall reimburse the City for any and all costs the City incurs in undertaking the eminent domain action.
 - (ii) Development of the Cibolo Parkway shall be subject to the following:
 - A. Route. As this is a community driven project, the City shall have the final determination as to the Cibolo Parkway route, so that the route complies with the City's Thoroughfare Plan and Future Land Use Plan and considers projected future development.
 - B. Construction Standards. Cibolo Turnpike will develop the Cibolo Parkway using TxDOT standards for roads of similar size and scope to ensure a quality design.
 - C. The Cibolo Parkway road surface shall be concrete and the road construction shall comply with the requirements of any City ordinance regulating road and street construction.
- (b) Cibolo Expressway:
- (i) Development of Cibolo Expressway. TxDOT is currently planning improvements on FM 1103 from the City's corporate limits near the intersection of FM 1103 and Chelsea/Old Wiederstein Road to Rodeo Way Drive. The proposed TxDOT improvements are to widen the existing two-lane facility to four-lanes, including raised

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medians and left turn lanes, two 5' bike lanes, curbs and gutters, underground storm sewer system, and 6' sidewalks along both sides of the roadway. (the "FM 1103 Improvements"). The existing FM 1103 right of way ("ROW") is 80 feet wide, and the proposed ROW is 120 feet. TxDOT will acquire this additional ROW. The City will request TxDOT that the design for the FM 1103 Improvements along that stretch of FM 1103 herein defined as the Turnback FM 1103 accommodate the Cibolo Expressway; and that TxDOT coordinate (to the extent practicable) the construction of the Cibolo Expressway with the construction of the FM 1103 Improvements in order to minimize traffic disruption on FM 1103.

- (ii) Land Acquisition. In the event that additional ROW is needed for the Cibolo Expressway, Cibolo Turnpike shall acquire the ROW following all City, State, and Federal rules and procedures. Any ROW acquired shall be consistent with the provisions of Section 4.8.
- (c) <u>Financing</u>. The Project shall be financed solely by Cibolo Turnpike from private capital and investment. Further, in no event shall the following ever occur:
 - (i) Creation of a public improvement district to fund any aspect of the toll lanes of Cibolo Expressway and Cibolo Parkway; or
 - (ii) The use of dedicated Local, State or Federal tax dollars to fund any aspect of the toll lanes of Cibolo Expressway and Cibolo Parkway; or
 - (iii) The use of public grants or direct governmental loans, such as Transportation Infrastructure Finance or Innovation Act loans, to fund any aspect of the toll lanes of Cibolo Expressway and Cibolo Parkway.
- (d) <u>Transfer of Title</u>. Upon completion of the Project, right of title and possession to the real property and the improvements shall be transferred to the City (or an instrumentality thereof), except for those rights of operation transferred to Cibolo Turnpike pursuant to the Operating Agreement, unencumbered by any liens or restrictions against its use as a public right-of-way, (including the right to place public utilities in such rights-of-way).
- (e) <u>Project Operation; The Operating Agreement</u>. The right, duty and obligation to operate the Project upon its completion shall be the responsibility of Cibolo Turnpike. Operational requirements relative to the Project shall minimally include the following:
 - (i) That the term of the Operating Agreement shall run co-terminus with this Agreement.
 - (ii) That tolls for vehicles traveling on the tolled portions of the Project shall be subject to the provisions of Section 9.2(c).
 - (iii) That the following vehicles shall not be subject to any toll for travel on the Project: official City of Cibolo vehicles, official City of Schertz vehicles, official Schertz-

Cibolo-Universal City Independent School District vehicles, and official Guadalupe County Sheriff's Office vehicles, vehicles being used by an entity to provide emergency services to the City under contract; or such other vehicles exempted by state law from the payment of tolls;

- (iv) That Cibolo Turnpike shall advise the City of the initial and future toll rates at least 90 days before implementation;
- (v) That the standards for Project operation shall, minimally, adhere to TxDOT's operational protocol for projects of similar size, scope and traffic count;
- (vi) That the City shall be entitled to provide to Cibolo Turnpike input regarding Project operation, which input shall be taken into consideration and, to the extent commercially and practically reasonable (within the financing structure to which the Project is at such time subject), implemented;
- (vii) That the payment of operations and maintenance costs shall have a first priority position in the event of the operator's default or bankruptcy;
- (viii) That Cibolo Turnpike shall maintain a customer service office within the City's corporate limits for the purpose of resolving claims of erroneous toll charges and related matters;
 - (ix) Requirement that operator maintain adequate liability insurance; and
- (x) A "buyback" provision, which shall state the terms and conditions by which the City may buy Cibolo Turnpike's interest in the Operating Agreement at a future date.
- herein), the City and Cibolo Turnpike shall negotiate the terms of a stand-alone "operating agreement" regarding the Project's operation that, minimally, encompasses a through g. of this Section 3.1, which operating agreement shall be presented to City Council for consideration; provided, however, that the failure of the City and Cibolo Turnpike to enter into a separate operating agreement shall not invalidate Cibolo Turnpike's right, duty and obligation to operate the Project as specified hereunder; provided further, however, that any operation of the Project by Cibolo Turnpike shall be subject to the minimum operational requirements specified in a through g. of this Section 3.1. For purposes of this Agreement, the term "Operating Agreement" shall mean any agreement pursuant to which Cibolo Turnpike operates the Project, whether by separate agreement or pursuant to the provisions of this Section 3.1 and other applicable provisions of this Agreement.
- (g) Non-Compete Language Prohibited. Cibolo Turnpike shall never require the City to enter into any "non-compete" agreement, and no contract authorized under this Agreement or the Operating Agreement shall ever negate or diminish the City Council's authority to plan, fund and construct future streets, roads, highways, mass transit, or other such improvements as City

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Council may, in its sole discretion, find necessary to address the transportation needs of the City and its citizens. Further, should such a "non-compete" provision be incorporated in any contract or agreement authorized by this Agreement, it shall be void ab initio.

(h) Other Governmental Approvals. The obligations of the Parties shall be subject to the ability to obtain any necessary approvals from other governmental entities that are required for completion and operation of the Project.

ARTICLE IV

PROJECT DEVELOPMENT

Section 4.1 Project Development - Phase I.

- (a) <u>Pro Forma Model</u>. During Phase I of Project Development, Cibolo Turnpike shall cause to be prepared a Pro Forma Model for the Project. Cibolo Turnpike will use the Pro Forma Model to determine the financial viability of the Project. The Pro Forma Model analysis will include the preliminary determination of various risk factors as they relate to development of the Project, such as environmental, design, cost and traffic and revenue issues.
- (b) <u>Term of Phase I</u>. Cibolo Turnpike shall begin Phase I upon the execution of this Agreement, and will diligently work on the Pro Forma Model. Upon the completion of the Pro Forma Model analysis, Cibolo Turnpike will present the results to the City, which shall include Cibolo Turnpike's proposed plan for Project Development Phase II. Phase I is anticipated to take approximately 10-12 months to complete.

Section 4.2 Project Development - Phase II.

- (a) <u>Project Development</u>. Phase II is the development of the Project including the detail design, ROW acquisition, bidding, and construction, and development of the Financial Model (as detailed below in Section 4.2(c)), and securing the funding as required for the development of the Project. Cibolo Turnpike shall comport with the requirements Texas Local Gov. Code Chapter 212, Subchapter C ("Developer Participation in Contract for Public Improvements") with respect to the development of the Project
- (b) Term of Phase II. Phase II the development of the Project will begin after Cibolo Turnpike completes Phase I Pro Forma and determines that the Project is financially viable. Commencement of Project construction shall not begin until Project funding has occurred (as detailed below in Section 4.3). Phase II will be complete upon the completion and acceptance of the construction of the Project. Notwithstanding the foregoing, this Agreement shall terminate if Financial Closing (as hereafter defined) does not occur within two years following commencement of Phase II.
- (c) <u>Financial Model</u>. Financial Model means the computerized financial model including projections and assumptions for operation of the Project showing, among other things: (a) costs for the operation and maintenance of the Project, including management payments to Cibolo Turnpike for its operation of the Project; (b) debt service costs for debt incurred by

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Cibolo Turnpike related to the Project; (c) reserves for operations and for capital improvements or such other reserves as may be required by sound engineering practice; (d) payments to Cibolo Turnpike as a return on equity invested by its partners, based on the Base Case Equity IRR, as defined and set forth in the Financial Model; and (e) payments to the City and Cibolo Turnpike as a split of all remaining revenues from the operation of the Project, based on the percentages as set forth in the Financial Model.

(d) <u>Construction Contract</u>. Cibolo Turnpike shall advertise for construction bids, issue bid proposals, receive and tabulate the bids, and award and administer the contract or contracts for construction of the Project (the "Construction Contract"). Administration of the Construction Contract shall include the responsibility for construction engineering, material acceptance testing, and construction quality acceptance, and for issuance of any change orders, supplemental agreements, amendments, or additional work orders that may become necessary after the award of the Construction Contract. The bidding process is to be competitive and comply with all applicable federal and State laws. Copies of the Construction Contract shall be provided to the City, including any bond or insurance requirement as detailed herein.

(e) <u>Insurance and Bonding Requirements</u>

- (i) <u>Performance Bonds</u>. Cibolo Turnpike will provide Performance Bonds to ensure completion of the Project. In addition, included within any successful bidder's Construction Contract, the successful bidder shall include a Performance Bond to ensure completion of the Project.
- (ii) <u>Insurance Requirement</u>. Cibolo Turnpike will provide the appropriate construction and management insurance package for the development of the Project (the "**Insurance Coverage**"). In addition, included within any successful bidder's Construction Contract will be the applicable Insurance Coverage consistent with the City coverages and as stated in Section 4.2(d) above.
- (f) <u>Development Standards / TxDOT Coordination.</u> As part of the development of the Project, Cibolo Turnpike will develop the Project using TxDOT standards (for road projects of similar size and scope) to ensure a quality design. In addition, Cibolo Turnpike will continually coordinate with TxDOT with all aspects of the Project including environmental coordination / approvals, and design approvals. Cibolo Turnpike will follow TxDOT's guidelines for 'local let' projects. The Project is planned to have a concrete pavement surface as previously described. Cibolo Turnpike will consult with TxDOT and the City regarding pavement design.
- (g) <u>Construction Management Services</u>. During the construction of the Project, Cibolo Turnpike shall manage the progress of construction through final completion of the Project. Cibolo Turnpike shall monitor the timing of commencement, progress and completion of Project construction by the contractor in accordance with the terms of the design, bid documents, environmental compliance issues, and the Construction Contract, and shall coordinate with the City and TxDOT as necessary or advisable to ensure compliance with any applicable State and federal requirements.

Page 9

Initials: CITY CAD CIBOLO TURNPIKE



- (h) <u>Project Communication</u>. During the construction of the Project, Cibolo Turnpike shall periodically, and no event less than once every three months, report the Project progress to the City Council. The first report shall provide City Council with an estimated timeline for completing each phase of the Project, the estimated Project costs, and any anticipated issues that may delay completion of the Project. Thereafter, Cibolo Turnpike shall update the City Council on construction progress and Project costs incurred during the preceding quarter.
- (i) <u>Project Completion</u>. When the Project is complete, Cibolo Turnpike shall issue and sign a "**Notification of Completion**" certifying that all work has been completed in accordance with the requirements of this Agreement, all governmental approvals, and applicable laws.
- Section 4.3 <u>Development Funding</u>. Cibolo Turnpike commits to use its commercially reasonable efforts to raise sufficient capital, either debt and/or equity (the "**Development Capital**") to be used to pay substantially all of the development costs of the Project. Funds for the development of the Project shall be secured prior to the commencement of Project construction (evidence of acquisition of which financing is referred to herein as "**Financial Closing**").
- Section 4.4 <u>Authority and Responsibility of Cibolo Turnpike During Development</u> Period Regarding the Cibolo Parkway and Cibolo Expressway. The City acknowledges and agrees that, consistent with and subject to the provisions of <u>Article IV</u>, during Phase I and Phase II of the Project's development, Cibolo Turnpike shall be responsible for, and have the authority to take, all actions it deems reasonably necessary to achieve the Financial Closing and thereafter for any further actions reasonably necessary to pursue all or any part of any Phase II (being the Project's development period). As noted above, Cibolo Turnpike will develop the Project following Texas Local Gov. Code Chapter 212, Subchapter C (Developer Participation in Contract for Public Improvements), which provides for Cibolo Turnpike managing the development of the Project. There may be additional actions that may be subject to the consent of City, which consent shall not be unreasonably withheld, may include, without limitation, the following:
 - (a) Managing the day-to-day business affairs of City relating to the Project.
- (b) Retaining engineers, consultants, attorneys, accountants, financial advisors and other professionals and entering into contracts with Cibolo Turnpike.
- (c) Identifying potential Project sites and negotiating for the acquisition of such Project sites.
 - (d) Commissioning and preparing all Project studies.
- (e) Selecting technology for the Project and negotiating for the acquisition or license of such technology.
- (f) Designing or supervising the design of the Project, including size, configuration, performance levels, operating parameters and related design matters.
- (g) Applying for such governmental approvals as may be required for the Project.
- (h) Preparing such bid documents as may be required for the acquisition of equipment, services and other assets necessary for the Project.



- (i) Negotiating contracts for the procurement of materials and supplies to be utilized by the Project.
- (j) Negotiating the acquisition of (or options to acquire) easements and rights of way as may be required for the Project.
 - (k) Negotiating contracts for Project utilities.
- (l) Negotiating contracts for the sale or other disposition of property determined to be surplus relative to the development of the Project.
- (m) Developing a plan of financing, preparing financing documents, preparing offering documents and doing all related work necessary to achieve Financial Closing.
 - (n) Developing a Market Standard package of insurance for the Project.
- Section 4.5 <u>Responsibility for Development Costs</u>. Cibolo Turnpike shall be responsible for the Project's development costs, including the payment of all costs incurred by Cibolo Turnpike in performing its obligations of the Agreement (which costs are subject to reimbursement from the Financial Closing).
- Section 4.6 <u>No Liability for the Development Costs</u>. If the Financial Closing does not occur, except as otherwise expressly set forth in the Agreement, neither the City nor Cibolo Turnpike shall have any obligation, express or implied, to reimburse the other Party for any Project development cost, but any party which breaches a material provision of this Agreement, and fails to cure such breach, shall be liable for actual damages suffered by the other party.

Section 4.7 <u>Level of Effort; Cooperation</u>.

- (a) In developing the Project under this Agreement, Cibolo Turnpike's obligations shall be limited to commercially reasonable efforts. Nothing herein shall imply or create the inference that if Cibolo Turnpike concludes, in its sole discretion, that the Project as envisaged by the Agreement will not be economically feasible or are not capable of being completed on a commercially reasonable basis, that Cibolo Turnpike must nonetheless continue developing the Project and expending additional funds; provided that if Cibolo Turnpike reaches a conclusion that the Project as envisaged by the Agreement will not be economically feasible or are not capable of being completed on a commercially reasonable basis, Cibolo Turnpike will deliver a "Determination of Non-Feasibility" to the City, expressing this conclusion and the reasons therefor. However, if Cibolo Turnpike reaches a conclusion that the Project, as envisaged by the Agreement, will be economically feasible and capable of being completed on a commercially reasonable basis, Cibolo Turnpike will deliver a "Determination of Feasibility" to the City, expressing this conclusion before the date of termination, as stated in Section 4.10. Upon the City's receipt of a Determination of Feasibility, Cibolo Turnpike shall become contractually obligated to fully complete the Project as envisaged by the Agreement.
- (b) Subject to the other provisions of this Agreement, the Parties hereto shall cooperate fully with each other and their respective officers, directors, employees, agents, counsel, accountants and other designees in connection with any steps required to be taken as a part of the Project.

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Section 4.8 Right of Way (ROW).

- COPY ROW Coordination. The Parties agree to coordinate with TxDOT and any other governmental authority in an effort to acquire any additional rights of way, including railroad crossing permits/approvals or sites for the Project through the use of existing or acquired road rights of way or other locations.
- ROW Acquisition Process. Cibolo Turnpike will acquire the necessary ROW for (b) the Project. The ROW acquisition process will follow all applicable State and federal rules regarding the acquisition of ROW. Cibolo Turnpike will keep the City informed throughout the ROW acquisition, including status, issues, and other items that may occur. Cibolo Turnpike goal and as directed by the City, is to acquire the ROW through a negotiated process and terms; however, only if all other means fail will the acquisition go to eminent domain.
- Eminent Domain. Cibolo Turnpike must make a good faith attempt (as established, minimally, as the basis upon which TxDOT procedures dictate the ROW acuisition process prior to the exercise of the power of eminent domain in similar circumstances) to acquire the ROW. Only thereafter shall the City agree to allow the use of its eminent domain authority, exercised only in accordance with the provisions of applicable Texas law, to secure remaining ROW property on behalf of the City.
- ROW Title. Title of the ROW property will ultimately transfer to and be held by the City (or an instrumentality thereof). During the ROW acquisition title of the ROW may be with an another entity to facilitate the process. The identification and use of the entity will be submitted for approval of the City, which approval shall not be unreasonably withheld.

Section 4.9 Ownership of the Studies; Government Approvals.

- In recognition of the fact that Cibolo Turnpike may have paid for the studies, Cibolo Turnpike shall retain ownership of such studies and government approvals issued to Cibolo Turnpike during the Project's development. All other studies and government approvals obtained by or issued to Cibolo Turnpike shall remain as the property of Cibolo Turnpike and in the event of a termination of this Agreement, all studies and government approvals obtained by or issued to Cibolo Turnpike shall remain as the property of Cibolo Turnpike. Nothing in this subsection shall preclude the Parties from agreeing, on mutually acceptable terms, for the transfers the studies and government approvals to the City.
- Provided Cibolo Turnpike proceeds with completion of the Project, should any portion of the Project be terminated or otherwise dropped from the Project by City in accordance with the terms of this Agreement, and Cibolo Turnpike is not in breach of this Agreement or initiated a claim against the City under this Agreement, City agrees to transfer to Cibolo Turnpike, at no cost to Cibolo Turnpike, copies of all governmental approvals, studies and all other rights held by City that are related to such terminated portions of the Project, to the maximum extent permitted by law or by the terms of any such rights or governmental approval.

CIBOLO TURNPIKE

Section 4.10 Termination.

- (a) This Agreement shall terminate upon (i) the delivery by Cibolo Turnpike to City of a Determination of Non-Feasibility; or (ii) notice by City at any time after December 31, 2018 (unless Cibolo Turnpike shall have notified City in writing that it has reasonably determined that additional time is necessary to achieve the Initial Financial Closing, but not to exceed 180 days) if the Financial Closing Date has not yet occurred; or (iii) the City determines that Cibolo Turnpike failed to coordinate with TxDOT the construction of the FM 1103 Improvements and the Cibolo Expressway, as described in Section 3.1(b)(i), so that such construction of both shall be accomplished simultaneously and cause minimal traffic interruption on FM 1103.
- (b) If this Agreement is terminated pursuant to <u>Section 4.10(a)</u>, each Party shall be released from its obligations under this Agreement, other than liabilities for any breach of this Agreement.
- Section 4.11 <u>Indemnification</u>. Cibolo Turnpike shall indemnify, defend and hold harmless the City and its respective City Council members, officers, employees, representatives, attorneys and agents (the "City Indemnitees") from any losses or claims that may at any time be imposed upon, asserted against or incurred by any City Indemnitee, to the extent such losses arise out of:
- (a) The inaccuracy in any material respect of any representation or warranty of Cibolo Turnpike contained herein or the failure of Cibolo Turnpike in any material respect to comply with any of its obligations under this Agreement; or
- (b) Cibolo Turnpike's breach of a contract with a third party, or the negligent acts or omissions, or the gross negligence, or the recklessness, or the willful misconduct of Cibolo Turnpike or any of its partners, contractors, agents or affiliates in connection with the Project.
- Section 4.12 <u>Limitation on Liability</u>. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, NEITHER CIBOLO TURNPIKE NOR THE CITY, NOR ANY OF THEIR RESPECTIVE PARTNERS, OFFICERS, EMPLOYEES, MEMBERS, REPRESENTATIVES, ATTORNEYS OR AGENTS SHALL BE LIABLE TO THE OTHER, WHETHER IN CONTRACT, TORT, WARRANTY, NEGLIGENCE, STRICT LIABILITY OR OTHERWISE, FOR ANY LOSS OR PROSPECTIVE PROFITS OR ANY OTHER SPECIAL, PUNITIVE, EXEMPLARY, INDIRECT, INCIDENTAL OR CONSEQUENTIAL LOSSES OR DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR ANY FAILURE OF PERFORMANCE RELATED HERETO, HOWSOEVER CAUSED, WHETHER ARISING FROM SUCH PERSON'S SOLE, JOINT OR CONCURRENT NEGLIGENCE.

ARTICLE V

PROJECT CONTRACTS, APPROVAL RIGHTS AND AUTHORITY

Section 5.1 <u>Cibolo Turnpike's Authority to Negotiate Project Contracts During</u>
<u>Development Period.</u> To the maximum extent permitted by law, City authorizes Cibolo Turnpike to identify parties, including without limitation, Cibolo Turnpike, Texas Turnpike

Initials: CITY CIBOLO TURNPIKE Page 13

Corporation and other affiliates of Cibolo Turnpike, to initiate and negotiate the terms of, all Project contracts that Cibolo Turnpike reasonably determines must be negotiated or executed prior to the Financial Closing and thereafter. Cibolo Turnpike will develop the Project following Texas Local Gov. Code Chapter 212, Subchapter C. (Developer Participation in Contract for Public Improvements), which provides for Cibolo Turnpike managing the development of the Project. Cibolo Turnpike's authority under this Section includes the authority to identify parties to, and negotiate the terms of, Project contracts. Such Project contracts may include, without limitation, project design, environmental studies, traffic and revenue studies, construction management agreements, agreements with investment bankers and other agreements related to the Financial Closing. To the extent practicable and consistent with the timely achievement of the Financial Closing, Cibolo Turnpike shall consult with City's Representative (as defined below) regarding the selection of other parties to Project contracts.

- Section 5.2 <u>Project Contract Provisions</u>. Unless otherwise agreed to by City or as otherwise specifically provided in this Agreement, in connection with the negotiation of the terms of Project contracts, Cibolo Turnpike shall use commercially reasonable efforts to include the following provisions in Project contracts:
- (a) The Construction Contract as recommended by Cibolo Turnpike based upon the low bid by pre-approved qualified contractors.
- (b) The party other than City (the "Contractor") shall use labor from the Project's general area to the extent reasonably available.
- (c) The liability of City, if any, pursuant to such Construction Contract shall be limited to the City's interest in Project assets.
- (d) The Contractor shall indemnify City Indemnitees for any losses to property, or liabilities to third parties directly or indirectly resulting from the negligence or willful misconduct of the Contractor in the performance or failure to perform its obligations under such Project contract, provided that such indemnity shall not apply to any such losses or liabilities incurred by City Indemnitees by reason of City Indemnitees' gross negligence or willful misconduct.
- (e) The Contractor shall waive all indirect, incidental, consequential, special, punitive or exemplary damages it might incur.
- (f) No Project contract shall become effective until the Financial Closing, except for obligations to satisfy conditions precedent and Project contracts that, by their nature, require effectiveness before such date (e.g., investment banker engagement letter).
- (g) The Contractor shall provide a performance, payment and completion bond, or shall agree to such other assurances (as, for example, a letter of credit or indemnification) as will provide reasonable assurance of performance, payment and completion.

ARTICLE VI

COMPENSATION



Section 6.1 Compensation / Return.

- (a) <u>Cibolo Parkway Facility</u>. If Cibolo Turnpike undertakes the Project, Cibolo Turnpike's base compensation will be as set forth in the Financial Model and City's compensation or return shall be an annual split of all remaining Surplus Revenues of the Project, based on the percentages as set forth in the Financial Model, which includes those surplus funds remaining under the indenture or other documents after providing for: (1) all operation and maintenance expenses, (2) taxes, (3) all debt service on debt incurred to finance or improve the Project, (4) all contractual commitments (5) all required reserves as set forth in the Financial Model, and (6) the necessary payments to Cibolo Turnpike to achieve a return on equity based on the Base Case Equity internal rate of return, all as further identified within the Financial Model or the Operating Agreement (as applicable).
- (b) <u>Cibolo Expressway Facility</u>. If Cibolo Turnpike undertakes the Cibolo Expressway and the Cibolo Expressway is financed as described herein, the parties' compensation or return shall be as identified within the Financial Model or the Operating Agreement (as applicable). In addition, reimbursement of "**Development Capital**", as defined and identified in the Financial Model, for the Cibolo Turnpike and Cibolo Expressway to the extent not paid pursuant to other provisions of this Agreement, shall be paid promptly, following the Financial Closing for any of the Project, from the proceeds of such financing, an amount equal to the Development Capital actually expended or incurred by Cibolo Turnpike to the Cibolo Turnpike and Cibolo Expressway, plus interest at a rate not to exceed 12% per annum.
- Section 6.2 <u>Development Fee</u>. Promptly following the Financial Closing for the Project, Cibolo Turnpike shall be paid solely from the proceeds of such financing a Development Fee equal to 2% of the principal amount, or if sold at a net premium, issue price, of such financing.
- Section 6.3 <u>Project Management Fee</u>. Cibolo Turnpike is authorized to receive an appropriate Project Management Fee to oversee and manage the development of the Project. The Project Management Fee shall equal to 3% of the estimated construction cost of the Project.
- Section 6.4 <u>Operating Management Fee</u>. Cibolo Turnpike is authorized to receive an appropriate Operating Management Fee all of which is detailed under the Financial Model or the Operating Agreement, as applicable. The Operating Management Fee is to cover the operations and management of the Project.
- Section 6.5 <u>City</u>. City's compensation shall be an annual split of all remaining Surplus Revenues of the Project, based on the percentages as set forth in the Financial Model, which includes a portion of those surplus funds remaining under the indenture or other documents after providing for: (1) all operation and maintenance expenses, (2) taxes, (3) all debt service on debt incurred to finance or improve the Project, (4) all contractual commitments (5)



all required reserves as set forth in the Financial Model, (5) the necessary payments to Cibolo Turnpike to achieve a return on equity based on the Base Case Equity IRR.

Reimbursement of City Expenses. As compensation for the City's costs incurred in connection with this Agreement, Cibolo Turnpike shall reimburse the City for staff time devoted to bringing the Project to fruition and consultant fees the City incurs directly related to the Project, which shall include: (A) an amount equal to \$15,000.00 to compensate the City for staff time, and (B) reimbursement to the City for the costs of legal, engineering and public relations consultant fees actually expended or incured by the City, plus interest at a rate not to exceed 12% per annum (accruing from the date of the City's payment of such costs through its receipt of reimbursement from Cibolo Turnpike). Cibolo Turnpike shall pay to the City these reimbursement during Phase I of Project Development (which is described in Section 4.1 hereof).

ARTICLE VII

CITY RESPONSIBILITIES

Section 7.1 Cibolo Parkway Project Input, Alignment. The development of Cibolo Parkway is the responsibility of Cibolo Turnpike. The City and Cibolo Turnpike will work together on the development of this portion of the Project. Cibolo Turnpike will seek input on various components of this portion of the Project. The City shall offer staff assistance and provide input on the Project development. The City shall provide guidance, direction and approval of the alignment of the Cibolo Parkway. Such input and approval on the alignment shall be in a timely manner. The final alignment as agreed to by the parties is not subject to changes and Cibolo Turnpike can rely on that final alignment.

Section 7.2 Cibolo Expressway. The development of Cibolo Expressway will be the responsibility of Cibolo Turnpike. The Cibolo Expressway will be constructed on the Turnback FM 1103 and therefore comprise part of the FM 1103 Improvements. These improvements are in addition to the TxDOT-constructed FM 1103 Improvements to be made to such stretch of FM 1103. Cibolo Turnpike will seek input from TxDOT on the design of the Cibolo Expressway and such design will comport with applicable TxDOT guidelines.

Section 7.3 TxDOT FM 1103 Turnback. The City, collaboratively with Cibolo Turnpike, will negotiate with TxDOT on the turnback of the Turnback FM 1103 Improvements to the City. Negotiation on the Turnback FM 1103 Improvements turnback to the City shall begin with the execution of this Agreement. For the avoidance of doubt, under no circumstances shall the Turnback FM 1103 include any portion of that facility that is located within the City of Schertz, Texas. Final acceptance of the Turnback FM 1103 would occur after the results of Project Development Phase I.

ARTICLE VIII



FINANCING THE PROJECT

Section 8.1 <u>The Project</u>. Cibolo Turnpike shall be solely responsible for all costs associated with the design and construction of the Project and any debt service related thereto. Cibolo Turnpike may elect to undertake the Project under the Operating Agreement by either Texas Turnpike Corporation or Cibolo Turnpike or an affiliate of them.

ARTICLE IX

OPERATING AGREEMENT

- Section 9.1 Operating Agreement. The Operating Agreement to be negotiated and executed by City, to Cibolo Turnpike, the Texas Turnpike Corporation or other affiliated entity designated by Cibolo Turnpike in accordance with this Agreement, shall be substantially in the form attached to this Agreement as Appendix A. The parties further acknowledge that the evolution of the Project may call for further modifications or amendments to the Operating Agreement and the parties accordingly agree to negotiate in good faith to identify the terms of any amendment that may be reasonably necessary, and to enter into such modifications of the Operating Agreement as are called for either before or after it is executed in order substantially to preserve the economic benefits to both Cibolo Turnpike and City as set forth in the Financial Model.
- Section 9.2 Operating Agreement Terms. Subject to the provisions of Section 3.1(f), the parties shall use their best efforts to negotiate the terms and provisions of an Operating Agreement prior to the end of Phase I. Such Operating Agreement shall provide, at a minimum:
 - (a) The term of the Operating Agreement to run co-terminus with this Agreement;
- (b) The exclusive right and obligation to manage, operate, and maintain the Project, including toll collections on the tolled portions thereof (being Cibolo Parkway);
- (c) Included as part of the Operating Agreement are the following provisions regarding tolled and non-tolled routes:
- (i) Trips beginning or ending on the Cibolo Expressway will not have to pay any toll relating to the Cibolo Expressway only.
- (ii) All trips beginning or ending on the Cibolo Parkway shall pay that portion of the tolls applicable to and for such trip.
- (iii) All "through" trips, meaning any trip that does not orginate or terminate in the City, shall pay tolls on both the Cibolo Expressway and the Cibolo Parkway; and
- (d) The remaining requirements concering Project operation specified in Section 3.1(e) hereof.

ARTICLE X REPRESENTATIVES

COPY Section 10.1 Cibolo Turnpike's Representative. Upon execution of the Agreement, Cibolo Turnpike shall designate, in writing, to City, the name of the individual who is to be the Cibolo Turnpike representative (the "Cibolo Turnpike's Representative") with full authority to execute any and all instruments requiring Cibolo Turnpike's signature and to act on behalf of Cibolo Turnpike with respect to all matters arising out of this Agreement. Cibolo Turnpike's Representative shall represent the interests of Cibolo Turnpike, be responsible for overseeing all aspects of design, construction and development of the Cibolo Turnpike and Cibolo Expressway, and work closely with City's Representative (as defined below). Any consent, approval, decision or determination hereunder made by Cibolo Turnpike's Representative shall be binding on Cibolo Turnpike; provided, however, Cibolo Turnpike's Representative shall not have any right to modify, waive or amend any provision of the Agreement, or terminate the Agreement.

Section 10.2 City's Representative. Upon execution of this Agreement, City shall designate the City's representative (the "City's Representative") and will provide Cibolo Turnpike with written notice of the identity of such individual so designated. With respect to any action, decision or determination which is to be taken or made by City under the Agreement, City's Representative may take such action or make such decision or determination or shall notify Cibolo Turnpike in writing of the person(s) responsible for such action, decision or determination and shall forward any communications and documentation to such person(s) for response or action. Any consent, approval, decision or determination hereunder by City's Representative shall be binding on City to the extent City has the legal power to delegate to an individual the ability to give such consent or approval or make such decision or determination; provided, however, City's Representative shall not have any right to modify, waive or amend any provision of the Agreement, or terminate the Agreement. Cibolo Turnpike and any Person dealing with City in connection with the Agreement or any matter governed by the Agreement may rely and shall be fully protected in relying upon the authority and capacity of City's Representative or any such designee to act for and bind City in any such matter, to the extent that such delegation of authority is authorized by the City Charter and State law.

From time to time following the execution hereof, Cibolo Turnpike may change or replace Cibolo Turnpike's Representative and City may change or replace City's Representative upon five (5) business days' written notice to the other party, delivered to such party in the manner and at the address indicated in Section 13.7.

ARTICLE XI

DEFAULT, ABANDONMENT

Section 11.1 Events of Default by City. The following shall constitute Events of Default by City under this Agreement:

Failure to observe or perform any material term, provision, condition or obligation under the Agreement, and failure to cure such default within thirty (30) days following notice or discovery of such default; provided, however, that if the failure to observe or

perform cannot reasonably be cured within the thirty (30) day period, the failure to observe of perform will not constitute an Event of Default if City begins corrective action within the thirty (30) day period and thereafter proceeds with reasonable diligence to effect the cure as soon as practicable.

- (b) Any material representation or warranty made by City that is false, misleading or inaccurate in any material respect at the time made.
- (c) The failure of City to honor Cibolo Turnpike's option to enter into the Operating Agreement.
 - (d) Default under the Operating Agreement.
- (e) City shall (i) apply for or consent to, or become subject to, the appointment of or the taking of possession by a receiver, liquidator, custodian or trustee of itself or of all or a substantial part of its property, (ii) admit in writing its inability, or be generally unable, to pay its debts as such debts generally become due, (iii) make a general assignment for the benefit of its creditors, (iv) commence a voluntary case under the Federal Bankruptcy Code (as now or hereafter in effect), (v) file a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or adjustment of debts, (vi) take any action for the purpose of effecting any of the foregoing, or (vii) be adjudicated as bankrupt or insolvent by any court.
- (f) Final legislative, administrative or judicial action after the date hereof that limits City's authority so as to materially and adversely affect its ability to perform its obligations under this Agreement or the Operating Agreement and City does not enter into an amendment to this Agreement as provided in Section 12.3 within thirty (30) days of such final legislative, administrative or judicial action. However, no future legislative changes shall ever cause the financial obligations related to the Tollway to become obligations of the City.
- Section 11.2 <u>Events of Default by Cibolo Turnpike</u>. The following shall constitute Events of Default by Cibolo Turnpike under the Agreement:
- (a) Failure to observe or perform any material term, provision, condition or obligation under the Agreement and failure to cure such default within thirty (30) days following notice or discovery of such default; provided, however, if the failure to observe or perform cannot reasonably be cured within the thirty (30) day period, the failure to observe or perform will not be an Event of Default if Cibolo Turnpike begins corrective action within the thirty (30) day period and thereafter proceeds with reasonable diligence to effect the cure as soon as practicable.
- (b) Any representation or warranty made by Cibolo Turnpike that is false, misleading or inaccurate in any material respect at the time made.
- (c) Abandonment by Cibolo Turnpike except as specifically permitted by the Agreement.

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(d) Cibolo Turnpike shall (i) apply for or consent to, or become subject to, the appointment of or the taking of possession by a receiver, liquidator, custodian or trustee of itself or of all or a substantial part of its property, (ii) admit in writing its inability, or be generally unable, to pay its debts as such debts generally become due, (iii) make a general assignment for the benefit of its creditors, (iv) commence a voluntary case under the Federal Bankruptcy Code (as now or hereafter in effect), (v) file a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or adjustment of debts, (vi) take any action for the purpose of effecting any of the foregoing, or (viii) be adjudicated as bankrupt or insolvent by any court.

Section 11.3 Remedies for City Default.

- (a) Upon the occurrence and continuance of an Event of Default by City under the Agreement, which City fails to cure, Cibolo Turnpike may suspend performance under the Agreement and Cibolo Turnpike will have such remedies as may be available to it law or in equity, subject to the limitations on adjudicated awards as set out in Texas Local Government Code Chapter 271 Subchapter I, which shall be controlling.
- (b) Upon the occurrence and continuance of an Event of Default by City under Section 11.1(a) of this Agreement, Cibolo Turnpike shall be entitled to injunctive relief against City.
- (c) Upon the occurrence and continuance of an Event of Default by City under the Agreement, Cibolo Turnpike may terminate this Agreement by delivering notice in writing to City specifying the nature of the Event of Default and establishing a termination date, which date shall not be less than thirty (30) days following the date of delivery of the notice whereupon the Agreement shall terminate on the specified termination date unless City shall have cured the Event of Default by such date, in which case the notice of termination shall be cancelled. Liabilities of City accruing under this Agreement prior to the date of termination shall survive any termination.
- (d) Without prejudice to any other rights and remedies that the other party may have, each of the parties agrees that damages may not be an adequate remedy for a breach of Section 11.1(a) of the Agreement, and that the other party will, in such case, be entitled to the remedies of injunction, specific performance or other equitable relief for any threatened or actual breach of Section 11.1(a) of this Agreement.

Section 11.4 Remedies for Cibolo Turnpike Default.

- (a) Upon the occurrence and continuance of an Event of Default by Cibolo Turnpike under this Agreement, City may suspend performance under this Agreement and City will have such remedies as may be available under this Agreement.
- (b) Upon the occurrence and continuance of an Event of Default by Cibolo Turnpike under the Agreement, City may terminate this Agreement by delivering notice in writing to Cibolo Turnpike specifying the nature of the Event of Default and establishing a termination date, which date shall be not less than thirty (30) days following the date of delivery of the notice

whereupon this Agreement shall terminate on the specified termination date unless Cibolo Turnpike shall have cured the Event of Default by such date, in which case the notice of termination shall be cancelled. Liabilities of Cibolo Turnpike accruing under this Agreement prior to the date of termination shall survive any termination.

- (c) Upon the occurrence and continuance of an Event of Default by Cibolo Turnpike under this Agreement, which Cibolo Turnpike fails to cure, and which constitutes a material misrepresentation, a negligent act or omission, or gross negligence, or recklessness, or willful misconduct by Cibolo Turnpike or any of its partners, contractors, agents or affiliates in connection with the Project or City may suspend performance under this Agreement and the City shall have such remedies as may be available to it law or in equity; including but not limited to recovery of actual damages the City may incur as a result of the breach.
- (d) Without prejudice to any other rights and remedies that the other party may have, each of the parties agrees that damages may not be an adequate remedy for a breach of Section 11.2(a) of the Agreement, and that the other party will, in such case, be entitled to the remedies of injunction, specific performance or other equitable relief for any threatened or actual breach of Section 11.2(a) of the Agreement.
- (e) Upon the occurrence and continuance of an Event of Default by Cibolo Turnpike under Section 11.2(a) of the Agreement, City shall be entitled to injunctive relief against Cibolo Turnpike.

ARTICLE XII

REPRESENTATIONS AND WARRANTIES

Section 12.1 <u>Cibolo Turnpike's Representations and Warranties</u>. Cibolo Turnpike hereby represents and warrants to City that:

- (a) <u>Organization</u>. Cibolo Turnpike is a Texas limited partnership duly formed, validly existing and in good standing under the laws of the State. Cibolo Turnpike has all requisite power and authority to enter into the Agreement and to perform its obligations hereunder.
- (b) <u>Authorization; No Violation</u>. The execution, delivery and performance by Cibolo Turnpike of this Agreement have been duly authorized by all necessary action and will not violate the organizational documents of Cibolo Turnpike or result in the breach of or constitute a default under any loan or credit agreement, other material agreement, judgment or decree to which Cibolo Turnpike is a party or by which Cibolo Turnpike, or its material assets, may be bound or affected; the Agreement has been duly executed and delivered by Cibolo Turnpike and the Agreement and the documents referred to herein constitute valid and binding obligations of Cibolo Turnpike subject to bankruptcy, reorganization, moratorium and other laws relating to the enforcement of creditors' rights generally and to general equitable principles (regardless of whether enforcement is sought in a proceeding at law or in equity).

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- (c) <u>Litigation</u>. No suit is pending against or affecting Cibolo Turnpike which could reasonably be expected to have a material adverse effect upon Cibolo Turnpike's performance under the Agreement or the financial condition or business of Cibolo Turnpike. There are no outstanding judgments against Cibolo Turnpike which would have a material adverse effect upon its assets, properties or franchises.
- (d) No Violation of Laws. Cibolo Turnpike has received no notice as of the date of the Agreement asserting any noncompliance in any material respect by Cibolo Turnpike with applicable statutes, rules and regulations of the United States of America, of the State, or of any other state or municipality or agency having jurisdiction over and with respect to the transactions contemplated in and by this Agreement; and Cibolo Turnpike is not in default with respect to any judgment, order, injunction or decree of any court, administrative agency, or other governmental authority which is in any respect material to the transactions contemplated hereby.
- Section 12.2 <u>City's Representations and Warranties</u>. As of the date of this Agreement, City makes the following representations and warranties to Cibolo Turnpike:
- (a) <u>Organization</u>. City is a public body and a political subdivision of the State and has all requisite power and authority to enter into this Agreement and to perform its obligations hereunder.
- (b) <u>Authorization; No Violation</u>. The execution, delivery and performance by City of this Agreement have been duly authorized by all necessary action and will not violate City's Home Rule Charter, ordinances, resolutions, or any applicable laws, or result in the breach of any material agreement, judgment or decree to which City is a party; this Agreement has been duly executed and delivered by City and the Agreement and the documents referred to herein constitute valid and binding obligations of City enforceable against City in accordance with its terms subject to bankruptcy, reorganization, moratorium and other laws relating to the enforcement of creditors' rights generally and to general equitable principles (regardless of whether enforcement is sought in a proceeding at law or in equity).
- (c) <u>Litigation</u>. No suit is pending against or affecting City which could reasonably be expected to have a material adverse effect upon City's performance under this Agreement.
- (d) No Violation of Laws. City has received no notice as of the date of this Agreement asserting any noncompliance in any material respect by City with applicable statutes, rules and regulations of the United States of America, the State or any agency having jurisdiction over and with respect to the transactions contemplated in and by this Agreement, and City is not in default with respect to any judgment, order, injunction or decree of any court, administrative agency, or other governmental authority which is in any respect material to the transactions contemplated hereby.
- Section 12.3 <u>Mutual Representations and Warranties; Restructure Due to Legislative, Administrative or Judicial Actions.</u> In the event of a final legislative, administrative or judicial action after the date hereof that limits Cibolo Turnpike's authority or the City's authority so as to materially and adversely affect either of said party's ability to perform its obligations under this Agreement, City and Cibolo Turnpike will in good faith negotiate changes to this Agreement

Initials: CITY CIBOLO TURNPIKE Page 22

reasonably acceptable to both parties that accomplish the purposes of this Agreement in a manner that preserves to the extent reasonably possible the economic benefits to both Cibolo Turnpike and City as set forth in the Financial Model.

ARTICLE XIII

MISCELLANEOUS

Section 13.1 <u>Uncontrollable Circumstances</u>. An "Uncontrollable Circumstance" is an event or circumstance, including an action of a governmental entity or a change in law, which prevents a party from performing its obligations under an agreement or which materially increases the time for performing under an agreement, which event or circumstance was not anticipated as of the date of the agreement, which is not within the reasonable control of, or the result of the negligence of, the claiming party, and which, by the exercise of due diligence, the claiming party is unable to overcome or avoid or cause to be avoided. Except as otherwise herein expressly provided, if either City or Cibolo Turnpike shall be delayed or hindered in, or prevented from, the performance of any covenant or obligation hereunder (other than the payment of money), as a result of any Uncontrollable Circumstance, and, provided that the party delayed, hindered or prevented from performing notifies the other party both of the commencement and of the expiration of such delay, hindrance or prevention (each notice being required within ten (10) business days of the respective event), then the performance of such covenant or obligation shall be excused for the period of such delay, hindrance or prevention and the period for the performance of such covenant or obligation shall be extended by the number of days equivalent to the number of days of the impact of such delay, hindrance or prevention. Failure to so provide the foregoing notice will not result in waivers of either an excuse in performance or an extension of time to perform under this Section 13.1 with respect to any such delay, hindrance or prevention.

Section 13.2 Amendment; Waiver. No alteration, amendment or modification hereof shall be valid unless executed by an instrument in writing by City and Cibolo Turnpike with the same formality as this Agreement. The failure of City or Cibolo Turnpike to insist in any one or more instances upon the strict performance of any of the covenants, agreements, terms, provisions or conditions of this Agreement or to exercise any election or option herein contained shall not be construed as a waiver or relinquishment for the future of such covenant, agreement, term, provision, condition, election or option, and shall not be deemed to establish a course of conduct among the parties, but the same shall continue and remain in full force and effect. No waiver by City or Cibolo Turnpike of any covenant, agreement, term, provision or condition, election or option of this Agreement shall be deemed to have been made unless expressed in writing and signed by an appropriate official on behalf of Cibolo Turnpike or City. The parties acknowledge that at the time this Agreement is executed, the precise details and scope of the Project have not yet been determined. Moreover, the parties acknowledge and agree that future efforts to pursue the development of the Project will evolve over time, and that subsequent developments may impact the terms of this Agreement and call for a modification or amendment of this Agreement. Accordingly, the parties agree to negotiate mutually and in good faith to enter into such amendments or modifications of this Agreement as may reasonably be indicated

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by the subsequent details that evolve concerning the Project that preserve the economic benefits to both Cibolo Turnpike and City as set forth in the Financial Model.

Section 13.3 <u>Consent</u>. Unless otherwise specifically provided herein, no consent or approval by City or Cibolo Turnpike permitted or required under the terms of the Agreement shall be valid or be of any validity whatsoever unless the same shall be in writing, signed by the party by or on whose behalf such consent is given.

Section 13.4 <u>Severability</u>. If any provision of this Agreement is held by final judgment of a court of competent jurisdiction to be invalid, illegal or unenforceable, such invalid, illegal or unenforceable provision shall be severed from the remainder of the Agreement, and the remainder of this Agreement shall be enforced. In addition, the invalid, illegal or unenforceable provision shall be deemed to be automatically modified, and, as so modified, to be included in this Agreement, such modification being made to the minimum extent necessary to render the provision valid, legal and enforceable. Notwithstanding the foregoing, however, if the severed or modified provision concerns all or a portion of the essential consideration to be delivered under this Agreement by one party to the other, the remaining provisions of this Agreement shall also be modified to the extent necessary to equitably adjust the parties' respective rights and obligations hereunder.

Section 13.5 <u>Binding Effect</u>. Except as may otherwise be provided herein to the contrary, this Agreement and each of the provisions hereof shall be binding upon and inure to the benefit of Cibolo Turnpike and City, and their respective permitted successors and assigns.

Section 13.6 <u>Relationship of Parties</u>. Nothing contained in this Agreement shall be deemed or construed by City or Cibolo Turnpike hereto or by any third party to create a relationship, partnership, joint venture or any association between Cibolo Turnpike and City.

Section 13.7 <u>Notices</u>. Except as otherwise provided herein, all notices, demands, consents, approvals, statements, requests and invoices to be given under this Agreement shall be in writing, signed by the party or officer, agent or attorney of the party giving the notice, and shall be deemed effective upon receipt if hand delivered or if sent by telecopy with transmission confirmation or overnight courier service; and if sent by the United States mail, postage prepaid, certified mail, return receipt requested, then it shall be deemed effective three (3) business days after mailing or the date of refusal, addressed as follows:

To City:

City of Cibolo 200 S. Main St. Cibolo, Texas 78108

Attn: Robert T. Herrera, City Manager

To Cibolo Turnpike:

Cibolo Turnpike L.P.

25 Highland Park Village #100-758

Dallas, Texas 75205

Attn: John N. Crew, Manager

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Either City or Cibolo Turnpike may from time to time by written notice given to the other pursuant to the terms of this <u>Section 13.7</u> change the address or designees to which notices shall be sent or designate one or more additional Persons to whom notices are to be sent.

Section 13.8 Governing Law. This Agreement and any matter relating to this Agreement, including any matter in contract or tort or in equity or at law, shall be governed by the laws of the State of Texas without regard to principles of conflicts of law that direct the application of the laws of a different state. If the parties do not agree to arbitration with respect to a particular claim or dispute in accordance with the terms of this Agreement, the parties agree that any legal action shall be brought in a state or federal court of competent jurisdiction in Guadalupe County, Texas, and the parties agree to establish venue in such county. The parties further agree that any such lawsuit that may be brought shall be tried by the court, without a jury.

Section 13.9 <u>Effective Date</u>. This Agreement shall be a legally binding agreement, in full force and effect, as of the date set forth in the first paragraph of this Agreement.

Section 13.10 <u>Further Assurances</u>. City and Cibolo Turnpike shall execute, acknowledge and deliver, after the date hereof, without additional consideration, such further assurances, instruments and documents, and shall take such further actions, as Cibolo Turnpike or City shall reasonably request of the other in order to fulfill the intent of this Agreement and the transactions contemplated hereby.

Section 13.11 <u>Third-Party Beneficiary</u>. The provisions of this Agreement are for the exclusive benefit of City and Cibolo Turnpike and not for the benefit of any third person, nor shall this Agreement be deemed to have conferred any rights, express or implied, upon any third person unless otherwise expressly provided for herein.

Section 13.12 <u>Counterparts</u>. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

Section 13.13 <u>Prior Agreements Superseded</u>. This Agreement supersedes any prior understanding or written or oral agreements between City or Cibolo Turnpike respecting the within subject matter, and contains the entire understanding between the parties with respect thereto. There are no oral agreements between City and Cibolo Turnpike.

Section 13.14 <u>Language</u>. The language used in this Agreement shall be deemed to be the language chosen by the parties hereto to express their mutual intent, and no rule of strict construction shall be applied against any party.

Section 13.15 <u>Computing Time, Saturday, Sunday or Holiday</u>. The day of an act, event, or default after which a designated period begins to run is not included when computing a period prescribed or allowed in this Agreement. The last day of the period is included, but if that day is a Saturday, Sunday or legal holiday of the City, the period extends to the end of the next day that is not a Saturday, Sunday or legal holiday.

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Section 13.16 <u>Approvals by City</u>. No approval by City shall impose, imply or be construed as an assumption by City of any duties or responsibilities of others with respect to the design or construction of the Project or for the construction means and methods employed by or on behalf of Cibolo Turnpike or any person retained by or on behalf of Cibolo Turnpike.

Section 13.17 <u>Lawsuits</u>. To the extent permitted by law, and without imposing a future debt obligation on the City, City agrees to cooperate with and assist Cibolo Turnpike in connection with initiating or defending any actions, including mediation, arbitration, or state or federal administrative or court proceedings, against or brought by third parties that threaten to stop, delay or increase the cost of (a) completion of the Project, (b) the imposition or collection of any revenue necessary for the funding of the Project, (c) the remediation, if necessary, of the Project Site, and (d) the negotiation, execution, or implementation of this Agreement or any other agreement between City and Cibolo Turnpike or otherwise related to the Project, including the enforcement of any indemnity provisions.

Section 13.18 Attorneys' Fees. In the event of any controversy, claim or dispute between City or Cibolo Turnpike arising from or relating to this Agreement (whether in litigation or arbitration, and including the enforcement of any indemnity provisions), the prevailing party shall be entitled to recover reasonable and necessary costs, expenses and attorneys' fees. For all purposes of this Agreement and any other documents relating to the Agreement, the terms "attorneys' fees" or "counsel fees" shall be deemed to include paralegals' and legal assistants' fees, and wherever provision is made herein or therein for the payment of attorneys' or counsel fees or expenses, such provision shall include such fees and expenses (and any applicable sales taxes thereon) incurred in any and all judicial, bankruptcy, reorganization, administrative or other proceedings, including appellate proceedings, whether such fees or expenses arise before proceedings are commenced or after entry of a final judgment.

Section 13.19 <u>Assignment</u>. Except for the City assignment to an instrumentality upon City creation thereof at any time (which may occur without the consent of Cibolo Turnpike), any assignment by either party must have the written consent of the other, such consent not to be unreasonably withheld. In the event that the City makes an assignment to an instrumentality, City shall notify Cibolo Turnpike thereof. Any purported assignment in violation of this <u>Section 13.19</u> shall be void. This section shall not limit the ability of Cibolo Turnpike to contract with any third party, including its own affiliates, to provide services to or in support of the Project.

Section 13.20 <u>Time of the Essence</u>. Subject to the terms hereof, time is of the essence with respect to the performance of each of the covenants and obligations contained in this Agreement.

Section 13.21 Mediation.

- (a) Any claim, dispute, or other matter in question arising out of or related to the Agreement shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.
- (b) City and Cibolo Turnpike shall endeavor to resolve claims, disputes and other matters in question between them by mediation which, unless the parties mutually agree

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otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association then currently in effect. Request for mediation shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of thirty (30) days from the date of filing unless stayed for a longer period by agreement of the parties or court order.

(c) City or Cibolo Turnpike agree to split the mediator's fee and any filing fees equally. The mediation shall be held in Guadalupe County, Texas, unless another location is mutually agreed upon. Written agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

Section 13.22 <u>Dispute Resolution</u>. Any claim, dispute or other matter in question arising out of or related to this Agreement or otherwise arising from the design and construction of the Project, shall first be subject to mediation in accordance with the provisions of Section 13.21 prior to instituting litigation. Claims, disputes and other matters in question between the parties may be decided by arbitration, but only if both Cibolo Turnpike and City so agree at the time the dispute arises.

Section 13.23 Arbitration. SECTION INTENTIONALLY DELETED.

Section 13.24 <u>Injunctive Relief</u>. Notwithstanding the foregoing, the provisions of <u>Section 13.22</u> and <u>Section 13.23</u> shall not apply to an action for injunctive relief or a writ of mandamus filed in connection with this Agreement.

Section 13.25 Confidentiality; Open Records Act.

- (a) Each party to this Agreement agrees to keep confidential and not use, reveal, provide or transfer to any third party any Confidential Information (as defined below) it obtains or has obtained concerning the other party to this Agreement or the Project, except as follows:
- (i) subject to Section 13.25(b), to the extent that disclosure to a third party is required by applicable law or regulation;
- (ii) information which, at the time of disclosure, is generally available to the public (other than as a result of a breach of this Agreement or any other confidentiality agreement to which a party to this Agreement is a party or of which it has knowledge), as evidenced by generally available documents or publications;
- (iii) information that was in its possession prior to disclosure (as evidenced by appropriate written materials) and was not acquired directly or indirectly from any other party to this Agreement;
- (iv) to the extent disclosure is necessary or advisable, to its employees, consultants or advisors, or to its affiliates or their employees, consultants or advisors, in each case solely for the purpose of carrying out their duties under this Agreement;

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- (v) to banks or other financial institutions or agencies or any independent accountants or legal counsel or investment advisors employed in connection with the Project, or by any party to this Agreement, to the extent disclosure is necessary or advisable to obtain financing, including, without limitation, the Project financing and the raising of the Development Capital by Cibolo Turnpike;
- (vi) to potential investors in connection with the Project financing and raising the Development Capital;
- (vii) to potential purchasers of a party to this Agreement or any affiliate of a party to this Agreement that directly or indirectly owns an equity interest in such party to this Agreement;
- (viii) to the extent necessary, disclosure to third parties to enforce this Agreement;
 - (ix) to another party to this Agreement; or
- (x) to parties that have signed or agreed to be bound by this confidentiality provision; provided, however, that in each case of disclosure pursuant to (iv), (v), (vi), (vii) or (ix), the persons or entities to whom disclosure is made agree to be bound by this confidentiality provision. The obligation of each party not to disclose Confidential Information except as provided herein shall not be affected by the termination of this Agreement. As used in this Section, the term "Confidential Information" shall mean information, which is clearly marked confidential, concerning this Agreement and the properties, operations, business, trade secrets, technical know-how and other non-public information and data of or relating to the parties to this Agreement or the Project.

The restrictions on disclosure of Confidential Information set forth above in <u>Section 13.25(a)</u> shall lapse two (2) years from the date of the termination of the Project. In the event a party withdraws from the Project, such party shall remain subject to the restrictions on disclosure of Confidential Information for two (2) years from the date of such party's withdrawal.

(b) If any Person requests City to disclose any Confidential Information under the Texas Open Records Act (Tex. Gov't Code Ann. § 552.001 et seq.) or equivalent or successor statute (the "Open Records Act"), prior to making such disclosure, City shall notify Cibolo Turnpike of such request, in which case Cibolo Turnpike shall promptly and timely inform City whether any of the requested materials constitute confidential, proprietary, commercial, financial or trade secret information of Cibolo Turnpike which may be exempted from disclosure under the Open Records Act, and, in that event, City and Cibolo Turnpike shall cooperate with each other in preparing appropriate responses or filings to the Attorney General of the State and to any Person making such request, including any appeals involved therein, to prevent a disclosure of such information. In such event, each party shall further cooperate with the other to promptly identify any possible third party whose privacy or property interests may be implicated by any such request to disclose information in order to enable Cibolo Turnpike to timely furnish to any such third party any statutory notice required by the Open Records Act and seek any applicable exemptions from disclosure under the Open Records Act. So long as Cibolo Turnpike is pursuing the actions described above in a timely manner, City shall protect confidential,



proprietary or trade secret information of Cibolo Turnpike as to which Cibolo Turnpike requests City to do so, unless otherwise compelled by court order, or by opinion of the Texas Attorney General. All reasonable and necessary costs associated with City's cooperation with Cibolo Turnpike hereunder in connection with any proceedings shall be borne by Cibolo Turnpike, and City shall be fully reimbursed for any of such costs it has reasonably incurred including reasonable attorneys' fees.

Section 13.26 <u>No Recourse to Cibolo Turnpike</u>. The obligations of Cibolo Turnpike under this Agreement are recourse solely to the interest of Cibolo Turnpike in the Project. No recourse or liability shall be had against any director, officer, employee, agent, member shareholder or partner of Cibolo Turnpike or of Texas Turnpike Corporation or their respective affiliates.

Section 13.27 Waiver of DTPA. CITY AND CIBOLO TURNPIKE HAVE ASSESSED THEIR RESPECTIVE RIGHTS, LIABILITIES AND OBLIGATIONS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION ACT, SECTION 17.41 ET SEQ., BUSINESS & COMMERCE CODE (THE "DTPA"). THE PARTIES AGREE THAT THE DTPA DOES NOT APPLY TO EITHER CITY OR CIBOLO TURNPIKE BECAUSE NEITHER QUALIFY AS A "CONSUMER" UNDER SECTION 17.45(4) OF THE DTPA. BUT IN THE EVENT THE DTPA IS DEEMED TO BE APPLICABLE BY A COURT OF COMPETENT JURISDICTION, CITY AND CIBOLO TURNPIKE HEREBY WAIVE THEIR RIGHTS UNDER THE DTPA, A LAW THAT GIVES CONSUMER SPECIAL RIGHTS AND PROTECTIONS. AFTER CONSULTATION WITH ATTORNEYS OF THEIR OWN SELECTION, CITY AND CIBOLO TURNPIKE CONSENT TO THIS WAIVER. THE PARTIES AGREE THAT THIS SECTION 13.27 CONSTITUTES A CONSPICUOUS LEGEND.

[Signature page follows.]

Initials: CITY CIBOLO TURNPIKE Page 29

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their proper officers respectively, being thereunto duly authorized, and their respective seals to be hereto affixed, as of the day and year first above written.

City of Cibolo, Texas:

3y:____

Allen Dunn

Mayor, City of Cibolo

Attest:

By: / eggs binner

Peggy Cimics, City Secretary

Cibolo Turnpike:

On behalf of CIBOLO TURNPIKE, LP, a Texas limited partnership

By:

CIBOLO TURNPIKE, GP, LLC,

a Texas limited liability company, its General

Partner

By:

TEXAS TURNPIKE CORPORATION,

a Texas corporation, its Sole Member and

Sole Manager

By:

John N. Crew, President and Chief Executive Officer

Signature Page to Development Agreement



EXHIBIT 1

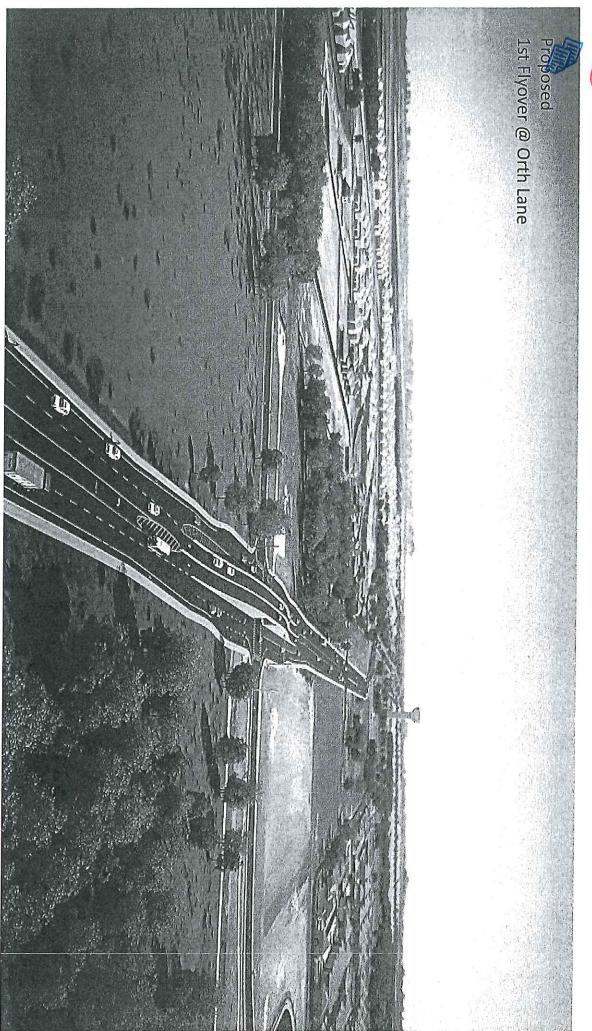
PROJECT MAP

[Unchanged from Existing Agreement]

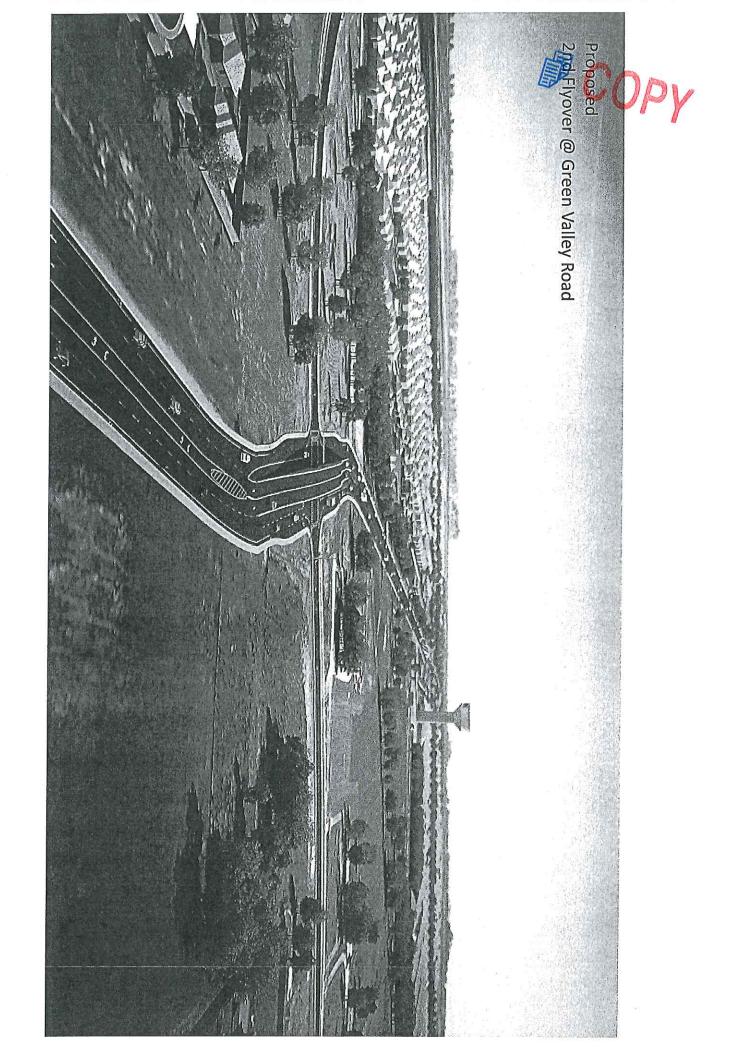


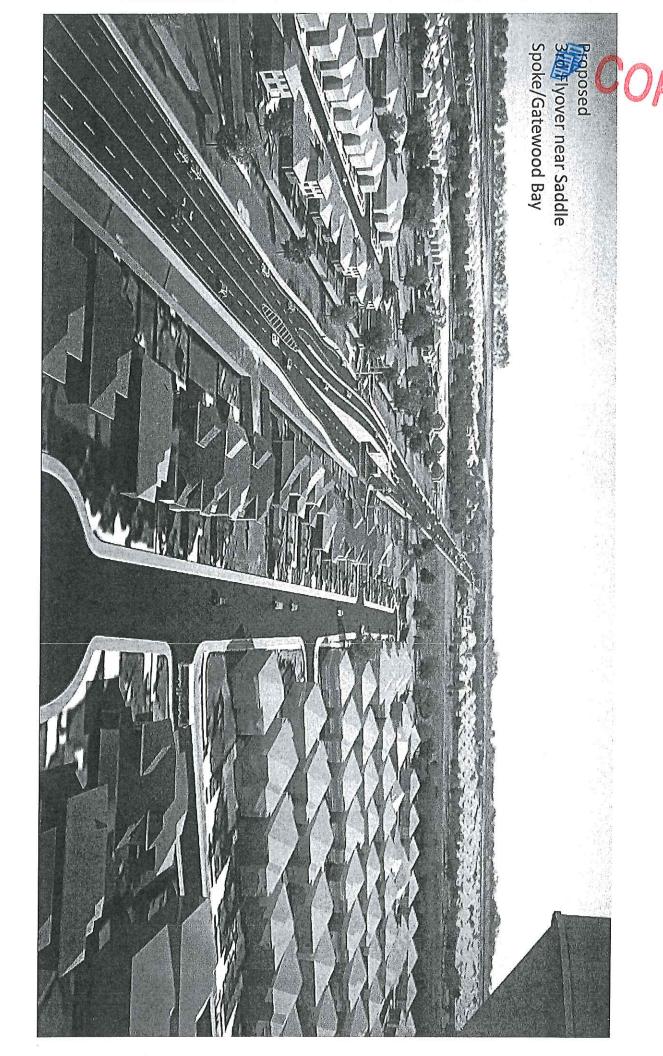
EXHIBIT 2

CIBOLO EXPRESSWAY CONCEPTUAL DESIGN









APPENDIX A



FORM OF OPERATING AGREEMENT

[Unchanged from Existing Agreement]